Supreme Court, U.S.
FILED

96 49 JUL 8 1996

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

ESTATE OF MARY VIRGINIA BUICE, DECEASED and WILLIAM RAMSAY BUICE, ADMINISTRATOR OF THE ESTATE OF MARY VIRGINIA BUICE, DECEASED,

Petitioners,

vs.

UNITED STATES FIDELITY & GUARANTY INS. CO.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

FLOYD J. LOGAN
Counsel of Record
Attorney at Law
P. O. Box 4207
Gulfport, MS 39502
(601) 864-3666
Counsel for the Estate of Mary Virginia Buice

July 8, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

SUPP

QUESTION PRESENTED

Whether in successive diversity actions, the second federal court must apply state rules of indemnitor/indemnitee collateral estoppel where such rules are an established part of the state's law on insurance and where the state has a substantial policy interest in regulating automobile liability insurance carriers.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 2

1. Introduction of the Principal Parties 2
2. Insurance Coverage for Knight 3
3. Facts of the Accident of July 6, 1984 4
4. USF&G's Defense of Knight 5
5. USF&G Claim Investigation 6
6. Course of Litigation after Withdrawal 8
7. The Course of the Action in the Courts Below .. 8

REASONS FOR GRANTING THE WRIT 11

1. THE VARIOUS FEDERAL CIRCUITS ARE DIVIDED ON WHETHER TO APPLY STATE OR FEDERAL RULES OF PRECLUSION WHERE A FEDERAL DIVERSITY JUDGMENT IS FOLLOWED BY A SECOND ACTION IN DIVERSITY JURISDICTION 11
2. THE EFFECT OF APPLICATION OF MISSISSIPPI SUBSTANTIVE LAW ON INDEMNITOR/INDEMNITEE COLLATERAL ESTOPPEL TO THE FACTS OF THIS CASE 15
   a. The allegations of the Complaint determine the insurer's duty to defend under Mississippi substantive law 15

TABLE OF CONTENTS – Continued

Page

b. The allegations of the Complaint imposed on USF&G a duty to defend 16

c. USF&G had a duty to defend but abandoned the defense of its insured 18

d. The effect of the withdrawal of the defense by USF&G..... 19

e. Effect of Breach of duty to defend..... 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Apparel Art Inter. v. Amertex Enterprises, Ltd., 48 F.3d 576 (C.A.1st 1995) 12

Audubon Ins. v. Terry Road Wine & Liquor, 875 F.Supp. 1243 (S.D. Miss. 1995) 28

Austin v. Super Valu Stores, Inc., 31 F.3d 615 (C.A.8th 1994) 12

B.N.E. Swedbank, S.A. v. Banker, 791 F.Supp. 1002 (D.C.N.Y. 1992) 12

Bates v. Union Oil Co., 944 F.2d 647, cert. den., 503 U.S. 1005, 112 S.Ct. 1761, 118 L.Ed.2d 424 (1991) 12

Boutwell v. Employers' Liability Assurance Corp., 175 F.2d 597 (C.A.5th 1949) 19, 22, 23

Brickell v. United States Fire Ins. Co., 436 So.2d 797 (Miss. 1983) 17

Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498 (C.A.11th 1990) 13

Cities Service Oil Company v. Dunlap, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939) 14

Douglas v. First Sec. Fed. Sav. Bank, 101 Md.App. 170, 643 A.2d 920 (1994) 13

Employers Reinsurance v. Martin, Gordon & Jones, 767 F.Supp. 1355 (S.D. Miss. 1991) 28

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 28

Federal Ins. Co. v. Gates Learjet Corp., 823 F.2d 383 (C.A.10th 1983) 12, 13

Fidelity Casualty of NY v. Carpenter, 234 F.2d 528 (C.A.5th 1956) 17

TABLE OF AUTHORITIES – Continued

Page

Follette v. Wal-Mart Stores, Inc., 41 F.3d 1234 (C.A.8th 1994) 12

Gibbs v. Air Canada, 810 F.2d 1529 (C.A.11th 1987) .. 12, 26

Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd., 58 F.3d 303 (C.A.7th 1995) 12

Howard v. Russell Stover Candies, Inc., 649 F.2d 620 (C.A.8th 1981) 16

Iowa Electric Light & Power Co. v. Mobile Aerial Towers, Inc., 723 F.2d 50 (C.A.10th 1983) 12

Jones v. Hartford Acc. and Indem. Co., 714 F.Supp. 808 (S.D. Miss. 1989) 19

Lowell Staats Mining Co. v. Philadelphia Elec. Co., 878 F.2d 1271 (C.A.10th 1989) 13

Mavar Shrimp and Oyster Co. v. USF&G, 187 So.2d 871 (Miss. 1966) 15, 16

Merchants Co. v. American Motorists, Inc., 794 F.Supp. 611 (S.D. Miss. 1992) 15

Mississippi Employment Security Commission v. Philadelphia Mun. Separate Sch. Dist., 437 So.2d 388 (Miss. 1983) 23

Monarch Ins. Co. v. Cook, 336 So.2d 738 (Miss. 1976) 27

Pardo v. Olson & Sons, Inc., 40 F.3d 1063 (C.A.9th 1994) 12

Pham v. Welter, 542 So.2d 884 (Miss. 1989) 25

Rhodes v. Chicago Insurance Co., 719 F.2d 116 (C.A.5th 1983) 16, 17

TABLE OF AUTHORITIES – Continued

Page

Ridgeway v. Gulf Life Insurance Co., 578 F.2d 1026 (C.A.5th 1978) 19, 22, 23

Ryan v. Royal Ins. Co., 916 F.2d 731 (C.A.1st 1990) 16

Shoup v. Bell & Howell Co., 872 F.2d 1178 (C.A.4th 1989) 12

Smith v. Safeco Ins. Co., 863 F.2d 403 (C.A.5th 1989) 12

Southern Farm Bureau Casuality Co. v. Logan, 119 So.2d 268 (Miss. 1960) 17, 22, 23, 27

Spiker v. Capitol Milk Producers Co-Op., 577 F.Supp. 416 (D.C. Va. 1983) 13

State ex rel. Moore v. Molpus, 578 So.2d 624 (Miss. 1991) 23

State Farm Mutual Automobile Ins. Co. v. Taylor, 233 So.2d 805 (Miss. 1970) 15, 16

Stonewall Ins. Co. v. Cooke, 165 Miss. 619, 144 So. 217 (1932) 28

Travelers Indemnity Company v. Watkins, 209 So.2d 630 (Miss. 1968) 15

Travelers Ins. Co. v. General Refrigeration and Appliance Co., 218 So.2d 724 (Miss. 1969).....15, 17

U.S. Fidelity & Guaranty Co. v. Bonner, 467 So.2d 955 (Miss. 1985) 15

USF&G v. Yost, 183 Miss. 65, 183 So. 260, sugg. of error overr. 185 So. 564 (1938) 24, 25, 28

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

44 Am.Jur.2d, Insurance, Sec. 1423, "Waiver or estoppel as to grounds of forfeiture or noncoverage", p. 371 24

Appleman, *Insurance Law and Practice*, § 4684, Duty to Defend Insured – Coverage of policy 15

Barker, William T., Settling Without the Insurer's Consent, Litigating the Coverage Claim, American Bar Assn. 1992, at p. 371 27

Couch on Insurance 2d (Rev ed) § 45:258, "Use of employee's automobile in employer's business" 17

Restatement of Judgments 2d, § 58, Effect of Judgment Against Indemnitee on Indemnitor who has Independent Duty to Defend Indemnitee 19, 20, 21

Wright, Miller, & Cooper, *Federal Practice and Procedure*, Vol. 18, Sec. 4472, "Effect of State Law on Federal Res Judicata Rules", 1996 Supp. at p. 560 13

PETITION FOR WRIT OF CERTIORARI

Petitioner, the ESTATE OF MARY VIRGINIA BUICE, Deceased and WILLIAM RAMSEY BUICE, Administrator of the ESTATE OF MARY VIRGINIA BUICE, Deceased, (hereinafter "Buice"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 7, 1996.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Fifth Circuit is unreported, and is reprinted in the Appendix hereto, App. 1, infra.

The decision of the United States District Court for the Southern District of Mississippi, is unreported and is reprinted in the Appendix hereto, App. 2, infra.

The Report and Recommendation of the Magistrate for the United States District Court, is unreported and is reprinted in the Appendix hereto, App. 35, infra.

The Default Judgment entered by the United States District Court for the Southern District of Mississippi, is unreported and is reprinted in the Appendix hereto, App. 39, infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Sec. 1332, the Petitioner brought this suit in the Southern District of Mississippi. On March 30, 1989, Plaintiff moved to Strike the answer, and also filed its Motion for Default Judgment. R.290. On June 18, 1990, the trial court

entered a Default Judgment against Defendants, Knight, for the sum of $1,173,591.00, App. 39, infra; R.452.

On September 26, 1990, the Buice Estate filed a Suggestion for Writ of Garnishment naming USF&G as Garnishee. R.454. USF&G filed its Answer and Motion to Dismiss on October 16, 1990. R.455. The Motion to Dismiss was denied.

The garnishment action proceeded to trial before the district court without a jury on December 14, 1992. On April 20, 1994, the district court entered its Bench Opinion in the garnishment action releasing USF&G from the writ of garnishment. App. 2, infra; R.829-851.

On petitioner's appeal, the Fifth Circuit on March 7, 1996, entered its *per curiam* judgment affirming the Southern District of Mississippi judgment. App. 1, infra. A petition for rehearing was filed and the Fifth Circuit entered an order denying the petition on April 8, 1996. App. 41, infra.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND RULES INVOLVED

There are no constitutional, statutory or procedural rules to be construed in this appeal.

STATEMENT OF THE CASE

1. Introduction of the Principal Parties

Petitioner, the Administrator of the Estate of Mary Virginia Buice (hereinafter "The Estate") is the father of Mary Virginia Buice, Rev. William Ramsey Buice.

Steve Knight, Jr., (hereinafter "Knight") was the owner of a business enterprise known as Steve Knight, Jr. Steel Fabricators, Inc., located at Port Bienville Industrial Park, Hancock County, Mississippi. Knight's steel fabricating operations covered barge repair, fabrication, and painting. Knight also operated a gravel pit in Nicholson, Mississippi. Knight employed Gary Brock to work for him at both the Nicholson and Port Bienville sites.

Respondent, USF&G is an insurance company that issues policies of insurance in Mississippi through its authorized agents.

On July 6, 1984, Gary Brock, returning to Port Bienville to meet and tie up barges as per the instructions of Knight, crossed the center line of Highway 90, and struck the vehicle driven by Mary Virginia Buice. She died of the resulting injuries.

2. Insurance Coverage for Knight

Knight required extensive business coverage in order to meet the contract requirements of his large corporate clients, such as Lykes Barge Lines and Avondale Shipyard. T.113-115, 186-188. Young provided Knight with a Business Auto Policy #041146688 (BAP) which was in effect on the date of the accident in question. R.1252.

USF&G's BAP provided coverage limits of $500,000 for specifically described motor vehicles, as well as a non-owned vehicle endorsement entitled "JXN 154-B":

> "It is agreed that the unqualified word 'insured' wherever used in Part IV – Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission."

> "Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles, or to operation of other automobiles while being used solely for business purposes in connection with your business."

Ex. P-1 at 15. The terms of this endorsement were authored by the Jackson office of USF&G.

Knight sold Brock the pickup truck which was involved in the accident in May of 1984. T.58. Brock financed the purchase through a bank, and the note was co-signed by Knight. Id. Brock used the vehicle on the job, and in fact, the accident investigator assumed that Knight was the owner of the vehicle. See Ex.8 to May 25, 1990, hearing to determine damages. The pickup truck involved in the accident was specifically endorsed off of the Steve Knight, Jr. Business Auto Policy on June 1, 1984, more than a month before the accident.

3. Facts of the Accident of July 6, 1984.

On July 6, 1984, Gary Brock worked for Steve Knight, Jr., Steel Fabricators, Inc., as a night watchman, mechanic, painter, blaster, and gravel pit operator. T.47-48, 66. One of his duties required that he meet barges and tie them up. The barges would be repaired or refurbished by Knight's business. Id. The testimony was uncontradicted that due to the nature of his duties, Brock was on call 24 hours a day. T.48, 66. Brock often stayed in Slidell on weekends, unless he had to be on the job. T.94. Knight paid Brock $8.00 per hour. He also provided Brock a trailer on the premises of the steel fabrication operation in which to live at no charge. T.49, 57. Friday, July 6, 1984, Brock worked at Knight's gravel pit in Nicholson, Mississippi. At the end of the day, he drove to the Port Bienville site in Pearlington, Mississippi, to pick up his paycheck,

at which time, Steve Knight informed him that Lykes barges would be arriving late that night, and Brock would need to be there to tie them up. T.50, 93-94. Knight gave Brock permission to go to Slidell, Louisiana, for dinner but directed him to come back to Pearlington to meet the barges. Id. On his way to dinner, Brock stopped at a friend's house to take her to dinner with him, but she was not at home. Brock then proceeded to a restaurant, where he ate and had a beer. T.50-51. After dinner, Brock stopped at a Time Saver Store and purchased two more beers, and then proceeded back to Pearlington. Id. On the way back to Pearlington to meet the barges he struck the vehicle driven by Mary Buice. T.51, 119, 338-339; Ex.D1-40 at 3. Brock was subsequently determined to be intoxicated, and was charged with manslaughter. He was tried of the charge and acquitted.

4. USF&G's Defense of Knight

The Buice Estate filed suit against Steve Knight, Jr. Steel Fabricators, Inc. on August 17, 1987. R.1.[1] USF&G retained attorney, Stanford Morse to represent its insured, Knight. On August 12, 1988, Stanford Morse filed an Answer on behalf of Steve Knight, Jr., Steel Fabricators, Inc. R.118. Morse's answer for Knight admitted that Brock was negligent, but denied that Brock was acting in the course and scope of his employment at the time of the accident. R.118, 119. On that same date, Morse wrote Knight:

Dear Mr. Knight:

USF&G has employed us to defend the above referenced case on your behalf. Its policy of insurance

---

[1] Time Saver Stores, Inc., was eventually dismissed prior to the Entry of Default against Defendants Knight.

> *requires the insured to cooperate and assist the insurer in the defense of this case.* Your failure to do so may result in no obligation to defend the case and to indemnify you for any judgment rendered by the Court within the limits of liability of the policy.
>
> Our review of the file indicates that it is highly unlikely that Gary Brock was on any mission for your company at the time of the accident. However, this defense has to be proven and your assistance is absolutely essential. Ex.D1-20; T.334,335. Emphasis added.

Neither USF&G nor Morse ever communicated to Knight that there was a question of coverage, or that he was being defended under a "reservation of rights or non-waiver agreement". USF&G did not advise Knight that he was being sued in excess of his policy limits. T.290-291.

5. USF&G Claim Investigation

On August 15, 1988, the date that the answer was filed, Darwin Ezell wrote David McMain, a supervisor in the Jackson office of USF&G and advised:

> After obtaining legal opinions from our attorneys we feel that we will have to file some type of answer on this suit and even though Gary L. Brock . . . carried insurance on his vehicle . . . , and even though our policy insures specifically prescribed [sic] vehicles, it is alleged in the suit that the driver, Gary Brock was on business for the insured at the time this loss occurred. . . . I believe you have a copy of the suspense and also copies of the police report. The police report lists the owner of the vehicle as Steve Knight Steel Fabricators. Ex. P.-23.

Two days later, Ezell placed a memo in his file that Morse had informed him that USF&G owed Knight a defense. T.289. Ezell also testified that he was aware on August 15, 1988, that the allegations of the complaint were sufficient to trigger coverage under the JXN154-B endorsement to the BAP. R.1139.

On August 22, 1988, Morse received a letter from Darwin Ezell advising him to withdraw because Brock's pickup was not "specifically described" in the policy, and, therefore, there was no duty to defend. Ex.D1-22, R.135-137.

Morse testified that when coverage was denied, Morse had in his possession the policy and endorsement, the complaint, and the knowledge that Brock was driving a non-owned vehicle. T.349-350.

On September 21, 1988, Morse filed his Motion to Withdraw. T.258, R.132. Prior to his withdrawal, Morse conducted no discovery in the case. Morse's affidavit in support of the Motion and Ezell's letter of August 18, 1988, which were attached as exhibits to the Motion, stated that the basis for withdrawal was that Brock's vehicle was not a "scheduled vehicle."

On December 5, 1988, Plaintiff moved to Amend the Complaint to name Steve Knight individually, and to allege, in addition to course and scope of employment, negligent entrustment. R.152. R.196. Morse responded to the Motion to Amend on December 5, 1988 by stating he had moved to withdraw and could not respond. Leave to amend was granted on December 8, 1988. On December 27, 1988, the Amended Complaint was filed. R.228.

USF&G, while it had notice of the Amendment, never filed another answer on behalf of Knight. The court on January 23, 1989, entered an order allowing Morse to withdraw. R.243. On April 20, 1989, Morse wrote to Joe

Montgomery, an attorney who Knight consulted, concerning USF&G's refusal to provide a defense. Morse's letter stated he was withdrawing the defense on behalf of USF&G because the vehicle was not a specifically described vehicle and, therefore, not covered. Ex.D-2,16. Morse's letter made no mention of the BAP policy or the issue of coverage under the non-owned vehicle endorsement, JXN-154B, even though USF&G's interoffice communications and Morse's correspondence demonstrate they were in possession of the non-owned vehicle endorsement.

6. Course of Litigation after Withdrawal

On January 25, 1989, Knight was served with the amended complaint. R.251. On March 30, 1989, Plaintiff moved to Strike the original answer, and also filed its Motion for Default Judgment. R.290. On May 25, 1990, the Trial Court granted the Motion of Plaintiff for entry of default, and referred the matter to the U.S. Magistrate for a hearing to determine damages. R.446. After a full hearing before the magistrate, The Report and Recommendation of the magistrate found as a matter of fact that Brock was acting within the course and scope of his employment at the time and place of the accident, and that Knight was responsible for the damages to the Plaintiff. R.448-448A, 449-451. The trial court adopted the Report and Recommendation of the magistrate and entered a Default Judgment against Defendants Knight for the sum of $1,173,591.00, on June 18, 1990. R.452.

7. The Course of this Action in the Courts Below.

On September 26, 1990, the Buice Estate filed a Suggestion for Writ of Garnishment naming USF&G and

Chicago as Garnishees. R.454. USF&G filed its Answer and Motion to Dismiss on October 16, 1990. R.455. The Motion to Dismiss was denied.

On November 19, 1991, the Buice Estate moved for Partial Summary Judgment on the basis that USF&G, in its answer on behalf of Steve Knight, Jr., Steel Fabricators, Inc., admitted that Brock was negligent but denied that Brock was in the course and scope of his employment; and that the magistrate determined and the District Judge found that Brock *was* acting in the course and scope of his employment. R.656-659. The Buice Estate asserted that the "scope of employment" allegation triggered a duty to defend, and that when USF&G refused to provide a defense, it was bound by the judgment against Knight because it *could* have defended him. For the first time, in defending this Motion, USF&G claimed that there was a fact issue as to coverage under the non-owned vehicle endorsement, JXN154-B, based on whether Brock was "solely" on his employer's business at the time of the accident. R.668-673.

On March 10, 1992, the Trial Court denied the Buice Estate's Motion for Partial Summary Judgment in a Memorandum Opinion, which was formalized in an Order of March 24, 1992. R.166, 167, 725, 748. The Court determined that Summary Judgment was not appropriate because "it is unclear . . . whether the vehicle was used solely for business purposes as outlined" in JXN154-B. R.729. The Court did not alter its previous adjudication that Brock was acting in the course and scope of his employment. Id.

The Buice Estate on March 30, 1992, Moved for Reconsideration, or alternatively, for an interlocutory appeal under 28 U.S.C. § 1292(b).

The Court denied the Motion to Reconsider on September 25, 1992 (R.945, 952), finding that there were insufficient facts on which to determine that USF&G had breached a duty to defend Knight. R.948.

On November 16, 1992, the Buice Estate resubmitted its Motion for Partial Summary Judgment. R.1109.

The garnishment action proceeded to trial before the district court without a jury on December 14, 1992 and the trial judge overruled the resubmitted Motion for Partial Summary Judgment in an oral decision prior to trial. R.829.

USF&G conceded prior to trial that the issue of whether Brock was using his vehicle in the course and scope of his employment by Knight at the time of the accident was precluded by the default judgment. In his opening statement to the trial court, counsel for USF&G stated:

> Now, we concede and have since I came into this case that the question of whether or not Gary Brock was in the course and scope of his employment at the time is precluded. Tr.p.32.

The trial court agreed:

> THE COURT: As I appreciate the judgment, it simply said that Brock was in the scope and course of his employment at the time of the accident. That is what's precluded. Tr.p.37

The attorney hired by USF&G to defend Knight conceded in his testimony that the default judgment established as a matter of law that the driver had not deviated from his employer's business purpose at the time of the accident.

> Q. Okay. If we assume for the purposes of discussion that earlier in the evening when he went to Catfish Charlie's and Ms. Hamilton's

> and to the Time-Saver, he had deviated from some mission of Mr. Knight, we know that we have got an adjudication in this case by virtue of the default judgment that at the time this tragic accident occurred, he was in the course and scope of his employment and, therefore, he had returned from any deviation. Would you agree with that? If it had been adjudicated he was in the course and scope, he's got to have not been in deviation at that time, hadn't he?
>
> A. I think as a legal matter, that's true. Tr.p.365.

On April 21, 1994, the district court entered its Bench Opinion dismissing the garnishment against USF&G. App. 2.

On petitioner's appeal, the Fifth Circuit on March 7, 1996, entered its *per curiam* opinion affirming the Southern District of Mississippi's judgment. App. 1.

A petition for rehearing was filed and the Fifth Circuit entered an order denying the petition on April 8, 1996. App. 41.

REASONS FOR GRANTING THE WRIT

1. THE VARIOUS FEDERAL CIRCUITS ARE DIVIDED ON WHETHER TO APPLY STATE OR FEDERAL RULES OF PRECLUSION WHERE A FEDERAL DIVERSITY JUDGMENT IS FOLLOWED BY A SECOND ACTION IN DIVERSITY JURISDICTION.

In addressing the issue of whether to apply state or federal rules of preclusion to successive diversity actions, the various federal circuits are in conflict.

The Eighth Circuit holds that the preclusive effects of a prior diversity action must be measured by the law that provided the substantive rules underlying the prior judgment, referring this issue to state law. *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234 (C.A.8th 1994); *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615 (C.A.8th 1994).

The Tenth Circuit has held that such questions must be referred to state law. *Federal Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383 (C.A.10th 1983); *Iowa Electric Light & Power Co. v. Mobile Aerial Towers, Inc.*, 723 F.2d 50 (C.A.10th 1983).

Interestingly, the Ninth Circuit has held that the preclusive effect of a prior diversity judgment must be determined by state law, but decided that the states of Washington and Oregon would apply federal law to the issue. *Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063 (C.A.9th 1994); *Bates v. Union Oil Co.*, 944 F.2d 647, cert. den., 503 U.S. 1005, 112 S.Ct. 1761, 118 L.Ed.2d 424 (1991).

The First, Fourth, Fifth, Seventh, and Eleventh Circuits have held that federal principles of preclusion control the effects of a federal diversity judgment in a subsequent federal diversity action. *Apparel Art Inter. v. Amertex Enterprises, Ltd.*, 48 F.3d 193 (C.A.1st 1995); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (C.A.4th 1989); *Smith v. Safeco Ins. Co.*, 863 F.2d 403 (C.A.5th 1989); *Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303 (C.A.7th 1995); *Gibbs v. Air Canada*, 810 F.2d 1529 (C.A.11th 1987).

The law of the Second Circuit is unclear on the question, but the Court has indicated a strong preference that federal law be applied in these cases. *B.N.E. Swedbank, S.A. v. Banker*, 791 F.Supp. 1002 (D.C.N.Y. 1992).

Although numerically, more circuits have elected to apply the federal rules governing preclusion in these

cases, one authority has stated that "It would be better to recognize that some matters should be referred to state law." Wright, Miller, & Cooper, *Federal Practice and Procedure*, Vol. 18, Sec. 4472 "Effect of State Law on Federal Res Judicata Rules", 1996 Supp. at p. 560. This authority has cited as examples where state rules should be applied: relationships that establish privity, where the matters are closely bound to state substantive law or important procedural interests of the court that entered the final judgment. *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271 (C.A.10th 1989); *Federal Ins. Co. v. Gates Learjet Corp., supra; Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498 (C.A.11th 1990); *Spiker v. Capitol Milk Producers Co-Op.*, 577 F.Supp. 416 (D.C.Va.1983); *Douglas v. First Sec. Fed. Sav. Bank*, 101 Md.App. 170, 643 A.2d 920 (1994).

The district court erroneously applied the principles of federal collateral estoppel to the facts of this case. By so doing, it refused to hold that the issue of the employment status of Brock at the time of the accident was precluded by the previous default judgment determination that he was acting in the course and scope of his employment at the time of the accident. The substantive law of the State of Mississippi governing indemnitor/indemnitee collateral estoppel should have been applied here.[2] Had the lower courts done so, Mississippi law would have required a holding that USF&G was precluded from relitigating the fact issue of whether Brock was "solely for business purposes in connection with [his employer's] business" at the time of the accident. This fact issue being precluded by the prior default judgment,

---

[2] Moore refers to the doctrine as a voucher-vouchee relationship. 1B Moore's Federal Practice, Sec.0.405(9)

there was coverage for Brock's vehicle under the BAP non-owned vehicle endorsement.

Here, the rights and obligations flowing from a contract of insurance are at issue. Clearly, the parties to a Mississippi insurance contract had a reasonable expectation that Mississippi substantive law would govern the obligations and benefits flowing from the insurance contract. The rights flowing from the indemnitor/indemnitee relationship created by the insurance policy are not mere "procedural" matters. These rights are substantial rights upon which contracting parties in Mississippi should be able to "confidently rely" in enforcing the obligations of the insurance contract. *Cities Service Oil Company v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939).

Further, the state of Mississippi has a strong public policy interest that its substantive laws regulating the conduct of insurance companies be enforced. The failure of the lower courts to apply the Mississippi rule of indemnitor/indemnitee collateral estoppel further frustrates the state's public policy and purpose underlying liability insurance covering the use of vehicles by non-owners:

> We are of the opinion that the court should take into consideration the fact that vast numbers of automobiles are being driven on the streets and highways of this state by persons who are not the named insureds in the public liability policies covering these vehicles. The omnibus clause should be construed in the light of the manifest public policy of this state as indicated in the Motor Vehicle Safety Responsibility Act and in the later Uninsured Motor Vehicle Act, both of which clearly indicate the legislative policy of protecting the public and providing insurance coverage where persons are injured on the highways of the state.

Travelers Indemnity Company v. Watkins, 209 So.2d 628 at 634 (Miss. 1968). See also, *U.S. Fidelity & Guaranty Co. v. Bonner*, 467 So.2d 955 (Miss. 1985).

2. THE EFFECT OF APPLICATION OF MISSISSIPPI SUBSTANTIVE LAW ON INDEMNITOR/INDEMNITEE COLLATERAL ESTOPPEL TO THE FACTS OF THIS CASE.

a. The allegations of the Complaint determine the insurer's duty to defend under Mississippi substantive law.

In order to make out a prima facie case of *collateral estoppel* on a coverage issue, the plaintiff must first show that the insurer had a duty to defend its insured in the underlying action. If the allegations of the lawsuit are within the coverage afforded by a liability policy, then the insurer must defend the insured. The fact that a duty to defend arises when a suit is within the coverage is said to be "self-evident." *Mavar Shrimp and Oyster Co. v. USF&G*, 187 So.2d 871 (Miss. 1966). The duty to defend exists when there is only a potential for coverage. Ultimate liability for coverage by the insurer is not dispositive of its duty to defend. To the contrary, the duty to defend is broader than the insurer's duty to indemnify under its policy of insurance: the insurer has a duty to defend when there is *any* basis for potential liability under the policy. *Merchants Co. v. American Motorists, Inc.*, 794 F.Supp. 611 (S.D. Miss. 1992). This is so, even where the allegations of facts and circumstances may be groundless, false or fraudulent. *State Farm Mutual Automobile Ins. Co. v. Taylor*, 233 So.2d 805 (Miss. 1970); *Travelers Ins. Co. v. General Refrigeration and Appliance Co.*, 218 So.2d 724 (Miss. 1969). See also, 7 C.J. Appleman, *Insurance Law and Practice*, § 4684.

In interpreting policy language to determine a duty to defend, courts will resolve any doubts and ambiguities in the insured's favor. *Ryan v. Royal Ins. Co.*, 916 F.2d 731 (C.A.1st 1990); *Rhodes v. Chicago Insurance Co.*, 719 F.2d 116 (C.A.5th 1983); *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620 (C.A.8th 1981).

The USF&G BAP, Part IV, Liability Insurance, provides as follows:

> 2. We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damages not covered by this policy.

This does not alter the duty of the insurer to defend presently defined under Mississippi law. See *State Farm Mutual Automobile Ins. Co. v. Taylor, supra; Mavar Shrimp & Oyster Co. v. USF&G, supra.* The allegations of the complaint determine the duty to defend, even when the allegations of the complaint are duplicitous, contradictory or not well-founded.

b. The allegations of the Complaint imposed on USF&G a duty to defend.

Steve Knight, Jr.'s Business Auto Policy contained a "Non-Owned Vehicle Endorsement", JXN154-B. Patsy Johnson, underwriter for Chicago Insurance Company[3], testified that in her opinion, the JXN154-B endorsement provided non-owned vehicle coverage for Knight. T.370. This is consistent with the general rule regarding business coverages: "When a liability policy covering non-

---

[3] Chicago Insurance Company provided umbrella coverage for Knight's businesses. Knight obtained his USF&G and Chicago policies from Crystal Springs Insurance Agency.

owned vehicles is issued to a business, coverage is provided for the employer and the executive officers for negligent acts of employees who operate non-owned vehicles within the scope of employment." *Fidelity Casualty of NY v. Carpenter,* 234 F.2d 528 (5th Cir. 1956); Couch on Insurance 2d (Rev ed) § 45:258.

The original and amended complaints in this case allege that (1) Gary Brock was negligent; (2) that he was acting within the course and scope of his employment by Steve Knight, Jr. at the time of the accident; and (3) that the negligence of Gary Brock caused the death of Mary Virginia Buice. These allegations very clearly bring the non-owned vehicle endorsement of the Business Auto Policy coverage into play. If USF&G felt there was a fact issue whether Brock's vehicle was being used "solely" for business purposes of Knight at the time of the accident, based on the case law, this issue had to be resolved in favor of coverage. USF&G was obligated to defend that issue in Knight's behalf. *Travelers Ins. Co. v. General Refrigeration and Appliance Co., supra.* In interpreting policy language to determine a duty to defend, courts will resolve any doubts and ambiguities in the insured's favor. *Rhodes v. Chicago Insurance Co., supra; Travelers Ins. Co. v. General Refrigeration and Appliance Co., supra.*

Under Mississippi law, USF&G acted at its peril when it refused to defend the suit against Knight. If USF&G entertained some doubt as to whether Brock was acting "solely" for business purposes of Steve Knight, Jr. at the time of the accident, it should have defended under a reservation of rights and resolved the coverage question at another time. *Brickell v. United States Fire Ins. Co.,* 436 So.2d 797 (Miss. 1983).

The allegations of the complaint and the facts known to USF&G's agents clearly imposed a duty to defend

under the non-owned vehicle endorsement of the business automobile policy.

c. USF&G had a duty to defend but abandoned the defense of its insured.

USF&G did not remain aloof from the underlying litigation against Steve Knight, Jr. USF&G hired an attorney to represent Steve Knight, Jr. and filed an answer in his behalf. This answer admitted the negligence of Gary Brock and actually raised the issue of whether Brock was acting within the course and scope of his employment at the time of the accident. The pleadings filed by USF&G left no issues to be litigated in defense of Knight other than whether Brock was acting within the course and scope of his employment at the time of the accident, and the amount of damages. USF&G undertook the defense of Knight with no reservation of rights or any other agreement limiting the nature of their defense of Knight. It further did not pursue a declaratory judgment action on coverage.

Having invited Knight's cooperation as an insured, and then having admitted facts which established Brock's negligence, USF&G prejudiced Knight's interests in the lawsuit, and then chose to withdraw from the lawsuit. The withdrawal was based on USF&G's contention that the vehicle that Brock was driving was not a described vehicle under either the business auto policy or the trucker's policy. USF&G did not withdraw on the basis that Brock was not using his personal pickup truck "solely" for business purposes, but because the truck was not scheduled. Considering the coverage provisions of the non-owned vehicle endorsement, USF&G's withdrawal of a defense to Knight was in error.

d. The effect of the withdrawal of the defense by USF&G.

Under Mississippi law, the consequences of a withdrawal from a defense are much greater than a simple failure to provide a defense. Not only is the insurer precluded from relitigating fact issues essential to coverage, but the carrier or insurer is further estopped to deny liability under the insurance policy. *Southern Farm Bur. Cas. Co. v. Logan*, 119 So.2d 268 (Miss. 1960); *Ridgeway v. Gulf Life Insurance Co.*, 578 F.2d 1026 (C.A.5th 1978); *Boutwell v. Employers' Liability Assurance Corp.*, 175 F.2d 597 (C.A.5th 1949); *Jones v. Hartford Acc. and Indem. Co.*, 714 F.Supp. 808 (S.D. Miss. 1989); *§ 58 Restatement of Judgments, supra.*

The holding of these cases is further in accord with the rules set out in *§ 58* of the *Restatement of Judgments*:

> (1) When an indemnitor has an obligation to indemnify an indemnitee (such as an insured) against liability to third persons and also to provide the indemnitee with a defense of actions involving claims that *might* be within the scope of the indemnity obligation, and an action is brought against the indemnitee involving such a claim and the indemnitor is given reasonable notice of the action and an opportunity to assume its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:

> (a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and
>
> (b) The indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee.

Restatement of Judgments § 58. Emphasis added.

The preclusive effect of an indemnitor's/insurer's failure to assume the defense of his indemnitee/insured is much broader than the preclusive effect of basic collateral estoppel as applied in the federal courts. The comments to the Restatement of Judgment (2d) clearly articulate the basis for the distinction.

> The duty to provide a defense is enforced by rules creating strong disincentives against default in performance of the duty. One such rule is that if the indemnitor fails to assume defense of an action involving a claim that "might be found to be" within the indemnity obligation, he is precluded from contesting not only the existence and extent of the indemnitee's liability to the injured person but also the obligation to indemnify. Another such rule is that the indemnitor may be liable for the whole of the indemnitee's liability and not merely the portion that is within the limits of liability in the indemnity agreement. Comments, Restatement of Judgments, 2d, Sec. 58 at p. 90.

It was in USF&G's best interest to litigate this question at the trial level. That is admitted in Morse's letter to Knight, where he advises Knight that Brock will have a hard time proving that he was on the job at the time of the collision, but that the defense will have to be proven. At that time, there was no conflict between the insured and the insurer, and the interests of judicial economy

could best be served. Again, the *Restatement of Judgments § 58* is instructive:

> (2) A "conflict of interest" for purposes of this Section exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not.

Both Knight and USF&G shared a common interest in proving a defense that Brock was not acting pursuant to his employment by Knight at the time of the accident, but was on a personal mission. This would have been a defense under Mississippi law to Knight's vicarious liability and would have been a defense to the "non-owned vehicle" endorsement for USF&G. Having chosen not to litigate and defend this fact issue, USF&G is estopped now to litigate it in defense of coverage. USF&G is precluded from relitigating the fact issue of whether Brock was using his personal pickup truck "solely" for business purposes of Knight at the time of the accident because they refused to litigate whether he was acting in the course and scope of his employment.

e. Effect of Breach of duty to defend.

USF&G asserted for the first time in defense of the Plaintiff's Motion for Partial Summary Judgment that it had no duty to defend because its non-owned vehicle endorsement prescribed that the use of the vehicle in question be "solely" in the business of the insured. By its failure to defend Knight on the issue of Brock's scope of employment, USF&G, and consequently Chicago, was bound by the default judgment.

USF&G breached its duty to defend and was estopped to deny liability under the non-owned vehicle

endorsement of the insurance policy. *Southern Farm Bureau Casualty Co. v. Logan, supra; Ridgeway v. Gulf Life Insurance Co., supra; Boutwell v. Employers Liability Assurance Corp., Ltd., supra.*

At the very least, USF&G had available to it the Declaratory Judgment procedures as well as defense under reservation of rights and/or a non-waiver agreement. Each of these avenues would preserve USF&G's rights and would also protect the insured from attendant liability and expense. USF&G chose not to utilize any of these, however, and after inducing Knight to cooperate, they withdrew their defense for a reason totally unrelated to their defense of the garnishment action.

In this action, the duty to defend an insured under Mississippi substantive law has been abrogated by the district court's and the court of appeal's refusal to apply Mississippi law on indemnitor/indemnitee collateral estoppel. USF&G, pursuant to its policy with Knight, owed a defense when it received the complaint which alleged that Knight was liable because Brock was alleged to have been in the course and scope of his employment when the July 6, 1984, accident occurred. USF&G obtained the cooperation of their insured, Knight, and after obtaining his confidence, chose to withdraw their defense of the action for a reason wholly unrelated to their defense of the garnishment action. The district court and the court of appeals erroneously held that collateral estoppel does not apply because "the issue of coverage under the insurance policy was not adjudicated in that opinion." (R.1269) This proposition conflicts with the Mississippi law quoted above, and no Mississippi Supreme Court decision can be found in support of this proposition. Further, since USF&G was not a party to the wrongful death action, and in Mississippi and most states

could not be, no adjudication of coverage could be made. However, USF&G is bound by, and "may not relitigate material fact issues" which placed the wrongful death action within the coverage of the policy. *Southern Farm Bureau Casualty Co. v. Logan, supra; Boutwell v. Employers Liability Assurance Corp., Ltd., supra; Ridgeway v. Gulf Life Insurance Co.*, 578 F.2d, at p. 1029. In *Ridgeway* the Court held that, for purposes of determining coverage in a garnishment action, the insurer was estopped to assert that the driver was not an employee of the insured because of its failure to defend the underlying liability action.

The trial court in its Bench Opinion cites two Mississippi cases for the proposition that the " . . . insurance companies must have had 'adequate incentive to litigate in the first case' and if there is any doubt regarding the reliability of the fact findings, 'collateral estoppel should never be applied.' " citing *State ex rel. Moore v. Molpus*, 578 So.2d 624 (Miss. 1991); and *M.E.S.C. v. Philadelphia Mun. Separate Sch. Dist.*, 437 So.2d 388 (Miss. 1983). The courts' reliance on these cases is misplaced for they do not deal with liability insurance carriers and indemnitor-indemnitee collateral estoppel.

The district court negates the preclusive effect of the failure to defend Knight on the employment issue by stating that coverage cannot be created "ex nihilo" by estoppel. This statement reflects an erroneous view of the facts and the law. There was coverage under the nonowned vehicle endorsement in this case, JXN 154B. There is no issue of lack of coverage for nonpayment of premium or the nonexistence of an insurance contract for some other reason. There is a valid and binding policy in this case with the nonowned vehicle endorsement, JXN 154B. The trial court so held in its ruling on plaintiff's

Motion for Partial Summary Judgment. (R.730) The effect of USF&G's failure to defend is not to create coverage where it does not exist, but to estop USF&G from denying the fact that Brock was acting within the course and scope of his employment at the time of the accident. This fact triggers a duty to pay under the nonowned vehicle endorsement to the BAP policy.

On page 19 of the court's Bench Opinion the court states that "An insurer may conduct the defense of a lawsuit against an insured until such time as the insurer discovers noncoverage," citing 44 Am.Jur.2d, Insurance, Sec.1423, p.371. An examination of that section of Am.Jur.2d reveals that the proposition cited is not a direct quote from the text. The text does cite a Mississippi case for the proposition that:

> But if the liability insurer conducts a defense of a suit against the insured after having received information sufficient to put it upon inquiry as to the ground of nonliability which it later seeks to assert against the insured, it will be precluded from disclaiming liability upon such ground. 44 Am.Jur.2d, Sec.1423, citing *USF&G Co. v. Yost*, 183 Miss. 65, 183 So. 260, Sugg. of error overr. 185 So. 564 (1938)

This lawsuit was filed in August of 1987. In an April 26, 1988 memo transmitting the Complaint to USF&G home office in Jackson, Gae Powell of Crystal Springs Insurance Agency states: "The accident occurred at 11:15 p.m. and we have nothing in our files to indicate that Gary Brock was 'on the job' at time of accident." (Ex.P-19) Clearly, as early as April of 1988, USF&G had "information sufficient to put it upon inquiry" as to Brock's employment status at the time of the accident. This topic continued to be an area of inquiry with USF&G, for when Stanford Morse, the attorney provided by USF&G, wrote

to Knight on August 12, 1988 and invoked Knight's cooperation, he stated:

> "Our review of the file indicates that it is highly unlikely that Gary Brock was on any mission for your company at the time of the accident. However, this defense has to be proven and your assistance is absolutely essential."(Ex.D1-20)

After meeting with Knight, Morse filed an answer in the lawsuit which admitted that Gary Brock's negligence caused the accident but denied that Brock was in the course and scope of his employment by Knight at the time of the accident. The answer was filed some months after the memo from Powell raising the employment issue. Meanwhile, Morse is corresponding with USF&G and rendering them advice on whether Knight has coverage. (Ex. D1-21, D1-22, D1-30) In December of 1988, Morse filed a motion to withdraw from the defense of Knight.

According to *Yost, supra,* USF&G waived its right to disclaim coverage under the policy. The Mississippi Supreme Court stated:

> It must be remembered that under the contract of insurance, during these many months in which the insured had exclusive control of the litigation, it rested content upon its own investigation, and exercised its own prerogative, as shown by the activities of its attorneys. . . . The loss of the power to manage and control his own case as he wills, as he chooses, is in all cases, harmful to an insured, and in this case was even more prejudicial. 183 So. at 263.

Morse abandoned Knight at a crucial part of the litigation and not only did not represent Knight, but represented USF&G to the detriment of Knight. *Pham v. Welter,* 542 So.2d 884 (Miss. 1989)

USF&G was well aware that the employment issue was to be litigated in the wrongful death action and withdrew from the defense of Knight with this knowledge. It was in USF&G's and Knight's best interests that the scope of employment issue be litigated and a finding be made that Brock was not acting within the course and scope of his employment at the time of the accident. This would have resulted in both Knight and USF&G being exonerated from any liability. There was no conflict of interest between USF&G and Knight on this issue. *Gibbs v. Air Canada, supra.*

The trial court found that there was no prejudice to Knight as a result of the actions of USF&G and its attorneys since Knight consulted with attorney Joe Montgomery. This reasoning would eviscerate the very policy basis underlying the consequences of breach of the duty to defend. As one authority has stated:

> It might be thought that, even after breach of the duty of defense, the insured would be obligated to take reasonable steps to mitigate the resulting damages. To be sure, this would be limited to the steps which the insured could take without undue risk or burden, but it would still afford some limitation to the breaching insurer's liability. But that would disregard the interests of the claimant, who also has rights under the policy if there is a proper determination of liability. Because the policy nowhere requires the insured to defend at all, a judgment for the claimant would be enforcible (if otherwise covered and within limits) after an unopposed "trial" at which only the claimant's case was presented. Inasmuch as the insurer's breach of the duty of defense excuses compliance with the no-action clause, even a default judgment would be enforcible up to the policy limits.

> Barker, William T., Settling Without the Insurer's Consent, Litigating the Coverage Claim, American Bar Assn. 1992, at p. 371.

See also, *Monarch Ins. Co. v. Cook*, 336 So.2d 738, 742 (Miss. 1976).

The fact that Knight consulted with an attorney that he was unable to pay, should in no way insulate USF&G from the preclusive effect of the default judgment. Joe Montgomery testified:

> . . . I knew that if I got into the case, it was going to be all the way to the Fifth Circuit and I really – the man had no money and really couldn't afford to hire a lawyer, and I told him I'd do what I could to help him short of actually defending that case. . . . I never had any intention of defending that case. (T.376)

USF&G was aware Knight was insolvent and unable to hire his own attorney as pointed out in Morse's letter to Darwin Ezell of USF&G on July 15, 1988. (Ex.D2-8) Knight was prejudiced for he was unable to afford an attorney to defend the case, an obligation under the insurance contract which Knight had the right to call on for USF&G to provide. Montgomery provided no defense to the wrongful death action, but continued to call upon USF&G to honor its duty to provide a defense. USF&G refused and a judgment against Knight in the sum of over 1.1 million dollars resulted.

Where the withdrawal of a defense will prejudice the insured, then the duty to defend is a continuing duty. *Southern Farm Bureau Casualty Co. v. Logan, supra,* holds:

> [T]he fact that the insurer assumes the defense may give rise to a duty to *continue* with the defense and make the insurer liable for its withdrawal therefrom, though it would not have been liable if it had not assumed the defense in

> the first instance. And the general rule is that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not estopped to do so if its action does not result in any prejudice to the insured.

119 So.2d at 272. Emphasis supplied.

See also, *Employers Reinsurance v. Martin, Gordon & Jones*, 767 F.Supp. 1355 (S.D. Miss. 1991); and *Audubon Ins. v. Terry Road Wine & Liquor*, 875 F.Supp. 1243 (S.D. Miss. 1995).

In *USF&G v. Yost, supra*, the court noted that where the insurer has exclusive control of the defense of its insured and conducts an inadequate investigation of the facts of the case, and subsequently withdraws, it waives any right of withdrawal of the defense of the case based upon what it could have learned if it had properly investigated. Assumption of the defense and withdrawal without adequate investigation by the carrier constitute prejudice to the insured. *Stonewall Ins. Co. v. Cooke*, 165 Miss. 619, 144 So. 217 (1932).

CONCLUSION

The trial court and the court below failed to apply Mississippi substantive law with respect to indemnitor/indemnitee collateral estoppel. The application of federal principles of preclusion to this case results in a violation of the principles of federalism set forth by this Court in the *Erie* Decision, results in judicial legislation by the lower courts, supplants Mississippi substantive law in an area where the state has important policy interests in application of its laws and deprives the Petitioner of a

just result. The important and recurring nature of the issue in the federal courts and the conflicts in the various circuits mandate this Court's exercise of its certiorari function to provide guidance in this area.

Respectfully submitted,

FLOYD J. LOGAN
LOGAN & BISE
Counsel for The Estate of Mary Virginia Buice
P. O. Box 4207
Gulfport, MS 39502
(601) 864-3666

July 8, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60384

ESTATE OF MARY VIRGINIA BUICE, Deceased, and WILLIAM RAMSEY BUICE, Administrator of the Estate of Mary Virginia Buice, Deceased,

Plaintiffs-Appellants,

versus

STEEL FABRICATORS, ET AL.,

Defendants,

UNITED STATES FIDELITY & GUARANTY INSURANCE CO. and CHICAGO INSURANCE CO.,

Garnishees-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(1:87-CV-517 GR)

(Filed Mar. 7, 1996)

Before LAY*, HIGGINBOTHAM and STEWART, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

---

* Circuit Judge of the Eighth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE, DECEASED, WILLIAM RAMSEY BUICE, ADMINISTRATOR — PLAINTIFF

VS. — CIVIL ACTION NO. 1:87cv517GR

STEVE KNIGHT, JR., STEEL FABRICATORS, INC., and/or STEVE KNIGHT, JR., INDIVIDUALLY, d/b/a STEVE KNIGHT, JR., STEEL FABRICATORS, INC. — DEFENDANTS

UNITED STATES FIDELITY & GUARANTY INSURANCE COMPANY and CHICAGO INSURANCE COMPANY — GARNISHEES

BENCH OPINION

(Filed April 21, 1994)

This cause came on for trial before the Court without a jury on December 14, 1992.[1] The Court, having fully considered the testimonial and documentary evidence presented by both parties at trial, the arguments of counsel, and the applicable law, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

---

[1] An order was entered on December 4, 1992, severing *Knight v. United States Fidelity & Guaranty and Chicago Insurance Company*, Civil Action No. 1:91cv352GR from this cause.

Findings of Fact

The plaintiff, Estate of Mary Virginia Buice, instituted a garnishment action against United States Fidelity and Guaranty Company [USF&G], and Chicago Insurance Company [Chicago] to satisfy a default judgment entered against Steve Knight, Jr.,[2] d/b/a Steve Knight Steel Fabricators, Inc., [SKSF] in June 1990. This lawsuit originated from an accident which occurred in 1984. Gary Brock, an employee of SKSF, while driving his personal vehicle, struck the vehicle of Mary Virginia Buice, resulting in fatal injuries to Ms. Buice.

Brock had purchased the pickup truck from Steve Knight. The truck was removed by endorsement from Knight's Business Auto Policy [BAP] on June 1, 1984. Brock procured automobile liability insurance policy on the pickup with Reliance Insurance which commenced coverage on June 1, 1984. The policy limits on the Reliance coverage were paid to the Buice estate.

USF&G issued five policies to Knight's business, three of which were in force during the period November 11, 1983, to November 10, 1984; Business Auto Policy No. BAP 041146688; Truckers Policy No. 026084300; and a General Liability Policy No. 025165294. A commercial umbrella policy[3] was issued to Steve Knight/SKSF by Chicago.

---

[2] Pursuant to Federal Rule of Civil Procedure 25(a)(1), Chicago submitted a suggestion of death upon the record of Steve Knight, Jr., on December 8, 1993.

[3] The policy number was 55C-2048572.

Burt Young was the agent that sold, collected the premiums, and received a commission on all of the business insurance policies for Knight's business. Young, doing business as Crystal Springs Insurance Agency [Crystal Springs], was an agent for USF&G with authority to bind policies.

Young took Knight's application for the umbrella policy with Williams Marketing Associates [Williams Marketing], financed the premiums, and received a commission for the sale of the policy. F.W. Williams Agency [Williams Agency] contracted with USF&G as their exclusive representative for writing USF&G policies in Mississippi prior to 1982. Williams Marketing was a wholly-owned subsidiary of Williams Agency. Williams Marketing gave Williams Agency the ability to write excess and surplus lines[4] that Williams Agency could not write.

USF&G purchased Williams Agency in 1982. At that time Williams Agency became a wholly-owned subsidiary of USF&G. Soon after the purchase, Williams Marketing's name changed to F & G Markets [F & G], remaining the wholly owned subsidiary of USF&G until sold in 1989. Interstate Insurance Group [Interstate], the owner of Chicago and F & G entered an agreement wherein F & G became the recognized broker for Chicago in March

---

[4] This included directors and officers liability, certain types of malpractice coverage, umbrella coverage and the like. (Exh. P-12, p. 9).

1987. The agreement provided in pertinent part as follows:

> Claims. The BROKER agrees to do everything possible to safeguard the interests of INTERSTATE and shall immediately report to INTERSTATE, with full details, any fact, occurrence or incident that may result in a claim or loss or increased risk of loss to INTERSTATE. The BROKER shall forward all claims, suits and notices of loss and cooperate fully with INTERSTATE to facilitate the investigation, adjustment, settlement and payment of any claim when and as requested by INTERSTATE. The BROKER will insist INTERSTATE in the collection of any deductible due from the insured.
>
> **WAIVER.** The forbearance, neglect or failure by INTERSTATE to enforce any or all of the provisions of this Agreement or to insist upon strict compliance by the BROKER shall not be construed as a waiver of any rights or privileges of INTERSTATE. A waiver of a past act or circumstance shall not constitute or be a course of conduct or waiver of any subsequent action or circumstance.

(Exh. P-10, pp. 3 & 4.)

The amounts of the applicable policies were as follows:

Chicago Umbrella Policy	$1,000,000
Business Auto Policy	550,000
General Liability Policy	300,000
Truckers Policy	500,000

The BAP contained a non-vehicle endorsement JXN 154-B which provided as follows:

> It is agreed that the unqualified word 'insured' wherever it is used in part IV – Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.
>
> Exceptions: *The following limitation does not apply* with respect to private passenger automobiles, or *to operation of other automobiles while being used solely for business purposes in connection with your business.*
>
> By acceptance of this endorsement, the insured agrees that this limitation shall be continuously in force, including subsequent renewals, until terminated by mutual consent.

(Exh. P-1.) (emphasis added.)

The term "nonowned automobile" is defined within the policy as follows: "Only those **autos you** do not own, lease, hire, or borrow which are used in connection with **your** business. This includes **autos** owned by **your** employees or members of their households but only while used in **your** business or **your** personal affairs." (Exh. P-1, p. 5.) (emphasis in original.)

The umbrella policy issued by Chicago, which was in full force and effect on the date of the accident, provided the following directives regarding notice:

In the event of any loss insured by this policy you should IMMEDIATELY contact your agent or broker or wire this company collect.

(Exh. P-4, Chicago Insurance Policy Title Page.)

CONDITIONS

C. Notice of Occurrence. When an occurrence takes place which is likely to give rise to a claim under this policy, written notice thereof shall be given to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the occurrence, the names and addresses of the injured and of available witnesses.

The insured shall give like notice of any claim made on account of such occurrence. If legal proceedings are begun the insured, when requested by the company, shall forward to it each paper thereon, or a copy thereof, received by the insured of the insured's representatives, together with copies of reports of investigations made by the insured with respect to such claim proceedings.

(Exh. P-4, Jacket Page 4.)

I. Notice Received by the Insurance Companies

Brock had worked at Knight's gravel pit operation in Nicholson, Mississippi, during the day of the accident. (Trans., p. 50.) Brock testified that he was on call 24 hours a day in case barges needed docking at night. (Trans., p.

48.) Brock went to Port Bienville to collect his pay and at that time, Knight informed Brock that he was needed at the facility that evening to tie up barges which were expected to arrive later. (*Id.*) Brock informed Knight that he was planning to go to Slidell, Louisiana, to eat. (*Id.*) Brock received Knight's permission to leave the jobsite to eat provided Brock returned in time to tie up the barges when they arrived. (*Id.*) Brock went to Slidell, stopped at his friend's home to invite her to eat, then proceeded to the restaurant. (*Id.*, p. 51.) Brock started back to Port Bienville, stopping at the Time Saver store to purchase two beers. (*Id.*) The fatal accident happened while Brock was on his way back to meet the barges after these events. (*Id.*) Brock testified he was being paid for his activities at the time of the accident. (*Id.*)

Brock was using his personal vehicle at the time the accident happened. (*Id.*, p. 49.) The testimony established that Brock purchased the truck from Knight about two months prior to the accident. (*Id.*, pp. 49, 58.) Knight had transferred title to the vehicle to Brock to enable Brock to obtain financing on the truck. (*Id.*, p. 92.)

Knight testified that Brock stayed at the Port Bienville facilities when he was working. (*Id.*, p. 94.) Knight stated that Brock stayed in a trailer on the premises "rent free" because the use of the trailer was included in his salary. (*Id.*, p. 98.) On cross examination, Knight was questioned about deposition testimony he gave in 1988 in which he stated there was not a barge expected at the Port Bienville facility on the night of the accident. (*Id.*, pp. 95-96.) Knight stated he made a mistake in the earlier testimony, stating he "had a lot on my mind", because he was in bankruptcy and had "just lost representation from

my insurance company." (*Id.*, pp. 96-97.) Knight testified that Brock was returning to the yard to tie up a barge during Brock's manslaughter trial. (*Id.*, p. 119.)

Brock testified that Glenda Hunnicutt, Knight's secretary, called young on the Monday following the accident to inform the agency of the accident as Hunnicutt often helped Brock with his personal affairs. (*Id.*, p. 60.) Hunnicutt testified that Knight stopped by her house on Saturday to tell her about the accident. (*Id.*, p. 67.) Knight instructed her to call Young on Monday to report the incident. (*Id.*) She testified that she spoke to Gae Powell, an insurance clerk, and then Young. (*Id.*, p. 68.) She stated that Young told her that he would "handle it" and did not ask for further information. (*Id.*) Knight was aware that Hunnicutt had procured personal insurance for several of Knight's employees. (*Id.*, pp. 109-110.) During Hunnicutt's conversation with Young's office, no one questioned her whether Brock was on duty at the time of the accident. (*Id.*, p. 76.)

Nancy Agin, an employee of Interstate[5], testified that usually notices of claims came from agents, insured, and other carriers. (Exh. P-13, p. 6.) She testified that a claim investigation basically uses the information obtained by the primary carriers, as Interstate's liability did not kick in until the primary carrier's coverage was exhausted. (*Id.*) According to Interstate's log entry regarding this accident, the first notification of the loss was in October 1990. (Exh. P-13, p.20.)

---

[5] Interstate underwrites policies for Chicago Insurance Company. (Exh. P-15, p. 10).

Loren Roberts, a casualty claim representative for Interstate, also testified that Interstate first received notice from USF&G of the Buice Claim in October 1990. (Exh. P-14, p. 5.) He stated that Duane Harris with USF&G informed him that the original claim was denied because the vehicle involved in the accident was not a "scheduled"[6] vehicle. (*Id.*, p. 10.) Roberts testified that Knight never informed Chicago that USF&G was not going to defend, nor requested that Chicago take up Knight's defense. (*Id.*, p. 39.)

Patsy Johnson, underwriting line manager for umbrella and excess policies for Interstate National Corporation, Inc., testified regarding the scope of umbrella policies. (Exh. P-15, p. 14.) Interstate, which does the underwriting for Chicago, was described as being similar to a parent company of Chicago. (*Id.*, pp. 10-11.) Umbrella policies are broader than excess policies and afford excess coverage to employer's liability, auto liability and general liability policies. (*Id.*) Johnson testified that non-owned and hired vehicles would be covered under the umbrella policy as long as the primary insurance covered them. (*Id.*, p. 28.)

Knight testified that Brock was using the truck involved in the accident as his personal vehicle. (Trans., pp. 92-93.) Brock had purchased the truck from Knight's business. (*Id.*, p. 92.) Knight testified that he did not inform USF&G or Young that he was sued. (Trans., p.

---

[6] A "scheduled" vehicle under an insurance policy is an insurance term which relates to a list of property and the value of each piece of such property for which the insurer will pay in the event of loss or damage. *Black's Law Dist.* 5th Ed., 1206.

101.) Knight indicated that his only contact with USF&G was through Stanford Morse. USF&G's retained attorney. (*Id.*, p. 103.) Morse informed Knight that there was no coverage under the insurance policy; that a motion to withdraw as counsel was filed in the suit; and that Knight should file any written objections to the motion to withdraw with the United States District Clerk. (Exh. D1-26.)

Knight testified that he spoke to Joe Montgomery about the lawsuit after Morse withdrew. (Trans., pp. 103, 115.) Knight stated that no attorney appeared before the court on his behalf in the lawsuit. (*Id.*, p. 104.) Knight testified that he brought all letters regarding the pending default to Montgomery's attention and apprised Montgomery that he could "do anything you need to do" on Knight's behalf in the suit. (*Id.*, pp. 104, 116.) Montgomery appeared as counsel for the plaintiff in Young's deposition held on October 24, 1989. (Exh. Chi-23.) Montgomery also appeared on Knight's behalf at several Rule 30(b)(6) depositions taken in Chicago, Illinois. (Exh. P-13, 14.)

Montgomery wrote a demand letter to USF&G, with copies to Crystal Springs and Floyd Logan, attorney for the Buice estate, on February 9, 1989. (Exh. Chi-24.) Montgomery sent follow up letters to USF&G on February 24; April 6; April 14; April 19; and May 5, 1989. (Exhs. Chi-25, Chi-26, Chi-27; and Pl.'s Resp. to Summ. J. Mot., Exhs. P, Q, R, S, and T.) Morse responded to the February 9 letter by indicating that the identified policy did not cover the Buice claims. (Pl.'s Resp. to Summ. J. Mot., Exh. W.) Further letters to Montgomery from Morse clarified USF&G's position that coverage did not exist under the policies for the incident and that USF&G had no duty to

defend Knight. (*Id.*, Exhs. X, Z, A, and AA; Exh. Chi-16.) Knight testified that he felt Montgomery would be authorized to give notice to the insurance company of the accident, if the need to notice was there. (Trans., p. 116.)

Young testified that the only coverage afforded by the BAP in effect at the time of the accident was for "Specifically described autos" which means that only the autos described in Item Four of the policy were covered under the policy. (Trans., p. 125.) Young further testified that neither the BAP nor the other policies in effect contained non-owned or hired coverage. (*Id.*) Young identified the form which deleted the truck from Knight's policy, which was marked as Exh. D1-7. (Trans., p. 128.) The effective date of the removal of the truck from Knight's policy was June 1, 1984. (*Id.*)

Young stated that Hunnicutt reported Brock's accident by a phone call to his office. (*Id.*, p. 132.) He stated that neither Knight or Hunnicutt specified whether to report the accident as connected with Knight's business. (*Id.*) Young stated that when the telephone call came to his office reporting the accident, Knight did not instruct Young whether to report the accident on his policy. (*Id.*, p. 148.) Young stated that he made the decision to report the accident to Reliance and not to USF&G or Chicago. (*Id.*, p. 160.) Young stated that he decided since the truck was removed form Knight's policy, it was not covered by Knight's policy. (*Id.*) Young testified that when Hunnicutt called about the accident, she was reporting the accident for Brock to trigger coverage on his individual policy. (*Id.*)

Young prepared an ACORD[7] loss form and sent it to United Pacific[8] in connection with Brock's accident. (*Id.*, p. 133.) young stated that an ACORD notice is the customary way of giving written notice of a loss in the insurance industry. (*Id.*, p. 146.) An ACORD form was not prepared or sent to USF&G until Young received a letter from Floyd Logan, informing him of the claim against Knight. (*Id.*, p. 134.) The ACORD notices sent to USF&G, marked Exhs. D-14 and D-15, were identified as the forms Young filled out to report the incident after Logan's letter was received. (*Id.*, p. 135.) Young testified that an ACORD loss notice was never sent to Williams Marketing. (*Id.*, p. 145.)

Young testified that all of the policies in effect on Knight's operation were kept in one file. (*Id.*, p. 171.) Young indicated that he did not report the accident to Knight's policies because the accident was reported regarding Brock's policy alone, and that neither Knight not Hunnicutt made a claim to his office under Knight's policies. (*Id.*, p. 170.)

After receiving notification of the lawsuit filed against Knight, Young's office contacted Williams Marketing and spoke to a party identified only as "Lena." A

---

[7] An ACORD loss form is the loss notice designed for private industry automobile losses, according to Young's testimony. (Trans., p. 133.)

[8] United Pacific is a wholly owned subsidiary of the Reliance Group.

follow-up memo sent after the conversation stated the following:

> Umbrella coverage only extends the coverage of the primary underlying coverages. If non-owned and hired is not on the primary, the umbrella would not provide this coverage. Need to be sure non-owned and hired is not on the primary.

(*Id.*, p. 208.) Young testified that he did not ask Williams Marketing to make the determination whether non-owned and hired was on the primary policy but relied on his own determination and USF&G's determination of that information. (*Id.*)

Powell, who no longer worked for Young at the time of the trial, testified that the Jackson claims office of USF&G was sent a notice sent to USF&G regarding the accident in April 1988. (*Id.*, p. 226.) USF&G and the plaintiff agree that a copy of the loss notice for Brock's loss was sent to USF&G with Knight's notice. (*Id.*, p. 240.)

Forest Holder, Sr., former claims office supervisor for USF&G, testified that he received notice of the Buice accident in 1988 and determined that no coverage was afforded the Brock vehicle under any of the policies in effect at the time. (*Id.*, p. 246.) He stated that the Brock vehicle was not listed on the trucker's policy, or the BAP. (*Id.*, pp. 246-247.) He stated that the comprehensive general liability policy did not extend coverage to automobiles. (*Id.*, p. 247.) He testified that the endorsement marked as exhibit D1-14[9] did not extend coverage for the

---

[9] This is the JXN-154 policy endorsement.

vehicle because the vehicle was not used solely for business purposes. (*Id.*, p. 248.) Holder testified that USF&G had factual information from their attorney (Morse) that Brock was not on business for Knight at the time of the accident. (*Id.*, p. 259.) Holder testified that he never got a written opinion from Morse regarding whether JXN-154-B extended coverage for the incident under the BAP. (*Id.*, p. 268.) Holder stated that the standard symbol indicting [sic] that non-owned vehicles were covered under the policy was not present in the BAP. (*Id.*, p. 270.)

Darrell Ezell, a claims adjustor for USF&G, testified that he determined that there was no coverage under the policies. (*Id.*, p. 277.) He stated that USF&G had a copy of the investigating officer's report; of Brock's insurance policy; and knowledge of the facts of the manslaughter case along with copies of the three policies at the time USF&G made its coverage determination. (*Id.*) Ezell testified that ordinarily the agent notifies the excess carrier of a claim. (*Id.*, p. 284.)

Ezell stated that the declarations page of the BAP contained a notice that JXN-154-B was an endorsement to the policy. (*Id.*, p. 279.) Ezell indicated that Morse's letter regarding coverage under the policies stated that there was no coverage under the BAP policy because the vehicle was not a specifically described vehicle. (*Id.*, p. 288.) Ezell testified there is a difference between being "solely on business for your employer" and acting in the scope of employment. (*Id.*, p. 298.) Ezell stated that the person's sole purpose must be for business of the employer to secure coverage under JXN-154-B. (*Id.*, p. 298.) He reiterated that he did not receive an opinion to this effect from

Morse or the Jackson office, which authored the endorsement. (*Id.*)

II. History of the Buice Lawsuit

The Buice estate filed a complaint against Knight in August 1987 alleging that Brock was Knight's employee and was acting in the course and scope of his employment at the time of the accident. The complaint also alleged that Brock was intoxicated or under the influence of alcohol at the time of the accident and that Brock's negligence was the cause of Mary Virginia Buice's death.

Two summons were issued to SKSF; one in August 1987, which was served on the Secretary of State, and an alias summons, which was issued and returned in December 1987. Knight appeared at an April 1988 deposition unrepresented by counsel. The Buice estate was allowed to file an amended complaint by an order dated December 8, 1988. The amended complaint added Knight d/b/a SKSF as a party defendant. Young was noticed [sic] of the lawsuit on April 27, 1988, and then notified USF&G of the suit. Morse, retained on behalf of USF&G, filed an answer on behalf of Knight in the lawsuit on August 12, 1988. (Exh. P-6.) The answer admitted Brock's negligence but denied that he was acting in the scope of employment at the time of the accident. (*Id.*, pp. 1-2.) USF&G sent no reservation of rights notice to Knight or Chicago.

Morse filed a Motion for Leave to Withdraw as Counsel for Knight on September 21, 1988. (Exh. P-6.) The motion states that after Morse appeared to afford Knight a defense, USF&G determined that the BAP and Trucker's

policy afforded no coverage on the vehicle involved in the accident. (Mot. to Withdraw, Exh. A, Morse Aff. and Pl.'s Resp. to Summ. J. Mot., Exhs. L and M.) The policies did not list Brock's vehicle as a covered vehicle. (Pl.'s Resp. to Summ. J. Mot., Exh. M.)

Morse met with Knight and informed him that the insurance policies provided no coverage for the incident and told Knight he would have to retain his own attorney. (Trans., pp. 103, 117.) Morse also sent a letter to Knight, dated September 21, 1988, advising him that USF&G "does not insure the above-referenced claim" and informing Knight that a motion to withdraw was filed, should he care to object to the motion. (Exh. D1-26.) Knight was served with an amended complaint in this cause on January 24, 1989. (Exh. D1-2.) Morse was allowed to withdraw as Knight's attorney by court order dated January 23, 1989. (Exh. D1-35.)

The Buice estate filed a motion to strike the answers and for default judgment against Knight on March 28, 1989. (Exh. P-39.) The Court entered a default judgment in the amount of $1,173,591 against SKSF and Knight individually on June 18, 1990. (Exh. D1-3.) The judgment, based on the Magistrate Judge's report and recommendation, found the accident was caused by Brock's negligence and that Brock was in the course and scope of his employment with Knight at the time of the accident. (Exhs. D1-3 and P-8.) A writ of garnishment was issued against USF&G and Chicago on September 26, 1990. There is no evidence that the issue of policy coverage was addressed in report and recommendation or the judgment.

Discussion

This cause comes before the Court as a garnishment action filed September 26, 1990, against USF&G, and Chicago. Garnishment actions are remedies available in federal court pursuant to Rule 64 of the Federal Rules of Civil Procedure. The rule provides in relevant part:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held; * * * . The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Garnishment is primarily a statutory remedy. *See* Miss. Code Ann. § 11-35-1 *et seq.* (1972). The cause is construed as an independent action from the primary action which established the judgment debt. *Butler v. Polk,* 592 F.2d 1293, 1295 (5th Cir. 1979). Therefore, since the underlying lawsuit was clearly within this Court's jurisdiction, and the garnishment action against the insurance companies is not altogether independent of the liability action between Buice and Knight, this Court properly retains jurisdiction to decide this action. *See Moore v. Sentry Ins. Co.,* 392 F.Supp. 929, 931 (S.D.Miss. 1975); *see generally Berry v. McLemore,* 795 F.2d 452 (5th Cir. 1986)

(which allows the action against the insurer on the basis of diversity).

The availability of garnishment is governed by state law; Mississippi recognizes insurance policy proceeds as properly subject to garnishment. *Jones v. Southern Marine & Aviation Underwriters,* 739 F.Supp. 315, 317 (S.D.Miss. 1988), *aff'd* 888 F.2d 358 (5th Cir. 1989). A judgment creditor may suggest any one of the four Mississippi grounds for garnishment to be answered by the garnishee. *Universal Life Ins. Co. v. Catchings,* 169 Miss. 26, 152 So. 817 (1934). All persons summoned as a garnishee must answer (1) whether he is indebted to the defendant (2) what effects of the defendant he has or had at the time of the service of the writ, (3) whether he knows or believes that any person is indebted to defendant; and (4) whether he knows or believes that any other person has effects of the defendant. *See Arky v. Cameron,* 92 Miss. 632, 46 So. 54 (1908); Miss. Code Ann. § 11-35-25.

USF&G has complied with these requirements. Their answer to Writ of Garnishment denies liability to Knight, denies possession of any of Knight's effects, and denies knowledge of any person indebted to Knight or having any of his effects. *See Grenada Bank v. Seligman,* 164 Miss. 168, 143 So. 474 (1932).

Chicago's answers and defenses also comply with the aforementioned requirements. Chicago denies that it is a defendant because Chicago does not possess or control any of Knight's effects; denies being indebted to Knight in any amount; and denies knowledge of any person indebted to Knight or having his possessions or control of such. *Id.* Chicago also avers that Knight failed to give

Chicago proper notice of the underlying claim or the filing of the complaint against Chicago. (Chicago's Answer & Defenses, filed August 22, 1991.) Chicago denies that plaintiffs forwarded notice of the claim itself or any litigation until a default judgment had been entered in the cause. (*Id.*)

I. Estoppel

The Buice estate argues that USF&G is estopped from denying coverage by its prior actions in the defense of this lawsuit. The plaintiffs contend that the insurance companies are estopped from denying coverage under the policies because of the Magistrate Judge's opinion granting the default judgment against Knight which found that Brock was acting in the scope of employment at the time of the accident. The factual basis for the determination that Brock was acting within the scope of employment is unclear. Plaintiffs contend that the Magistrate Judge's decision collaterally estops the current adjudication of the insurers' liability under the policies.

Collateral estoppel prevents the relitigation of issues which were central to a judgment entered in one case in subsequent litigation between the parties. *Harris v. Washington,* 404 U.S. 55 (1971). Unlike *res judicata,* collateral estoppel only applies to issues actually litigated in a prior suit. *Walker v. Kerr-McGee Chem. Corp.,* 793 F.Supp. 688, 694 (N.D.Miss. 1992). Under Mississippi law, the mutuality of parties in the lawsuits is strictly interpreted for the effect of prior state court litigation on the use of collateral estoppel. *Walker,* 793 F.Supp. at 696.

Otherwise stated:

> [t]he essential elements of an equitable estoppel are:
>
> > Conduct and acts, language or silence, amounting to a representation or concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation or silence, or concealment be relied upon, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence.

Chapman v. Chapman, 473 So.2d 467, 470 (Miss. 1985) (citing *Crowe v. Fotiades*, 224 Miss. 422, 80 So.2d 478, 486 (1955)).

This doctrine has also been applied to the conduct of insurers who withdraw their representation of their insureds. In *Hartford Accident & Indem. Co. v. Lockard*, 239 Miss. 644, 124 So.2d 849 (Miss. 1960), the court stated:

> "In order to create an estoppel in pais the party pleading it must have been misled to his injury, or the party pleading it must have been misled to his hurt or prejudice, * * * by the conduct or representations of another on which he relied and by which he was influenced and induced to act, or to refrain from acting, or to change his position; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect." 31 C.J.S. *Estoppel* § 74, p. 276. The general rule is that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not

> estopped to do so if its action does not result in any prejudice to the insured. *Southern Farm Bureau Casualty Ins. Co. v. Logan*, 1960, 238 Miss. 580, 119 So.2d 268 (1960).

Lockard, 124 So.2d at 856.

A federal court, sitting in diversity and considering the collateral estoppel effect of a prior federal court judgment will apply federal standards in determining the preclusive effect of a prior judgment on a particular issue to a subsequent diversity action. *Walker*, 793 F.Supp. at 697. Collateral estoppel will apply in a federal diversity case when:

> (1) the issue at stake be identical to the one involved in the prior litigation;
>
> (2) the issue has been actually litigated in the prior litigation; and
>
> (3) the determination of the issue in the prior litigation [has] been a critical and necessary part of the judgment in that earlier action.

Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981). The defense must be pled by the party seeking collateral estoppel and the party raising the defense must define the precise legal issue decided in the prior action. *Nichols v. Anderson*, 788 F.2d 1140, 1141 (5th Cir. 1986). *Res judicata* would bar relitigating the same issues tried and adjudicated in the default judgment. *Law Offices of Moore & Assoc. v. Aetna Ins. Co.*, 902 F.2d 418, 420 (5th Cir. 1990).

There is no evidence that the issue of *res judicata* was raised in the amended complaint, motion for entry of default judgment, or in the suggestion for writ of garnishment. (Exh. D1-1, Am. Compl.; P-39, Mot. to Strike Ans.

and to enter Default Judgment; Suggestion of Writ of Garnishment on Judgment.) The Magistrate Judge determined that Brock was acting in the scope of his employment at the time of the fatal accident. However, the issue of coverage under the insurance policy was not adjudicated in that opinion. In fact, this Court explicitly stated that coverage under the insurance policy was not determined in the adjudication of the default judgment. (Memo. Op. April 25, 1991, pp. 13-14.)

The insurance companies must have had "adequate incentive to litigate in the first case" and if there is any doubt regarding the reliability of the first fact findings, "collateral estoppel should never be applied." *State ex rel. Moore v. Molpus*, 578 So.2d at 643; *M.E.S.C. v. Philadelphia Mun. Separate Sch. Dist.*, 437 So.2d 388, 397 (Miss. 1983).

Furthermore, collateral estoppel applies only when the issues are actually previously *litigated. State Farm Mutual Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 601 F.Supp. 286, 288 (S.D.Miss. 1984). A default judgment is not a litigation of the issue of coverage for the accident in this case. *See Nichols*, 788 F.2d at 1141; *Restatement (Second) of Judgments* § 27, Comment e (1982).

The Magistrate Judge was not construing or interpreting the USF&G policy at the time of his decision and the policy was not before the Court at the time of the decision. The Court expressly stated that the issue of policy coverage was not considered or determined by the Magistrate Judge in his decision.

An insurer may conduct the defense of a lawsuit against an insured until such time as the insurer discovers noncoverage. Insurance, 44 Am. Jur. 2d § 1423, p.

371. An insurer may be estopped from denying liability under a policy if the insurer's conduct results in prejudice to the insured. *Id.*, § 1428, p. 376. In this case, Knight was informed well in advance of the entry of the default judgment that USF&G was withdrawing from his defense, as the company determined that there was no coverage for the incident in any of the policies in force at the time of the accident. In fact Knight obtained the assistance of another attorney after Morse told Knight that USF&G was withdrawing from the defense of the lawsuit. The unopposed default judgment was entered without testimony.

If an insurer suspects non-liability due to lack of policy coverage, and plans to defend on an issue of non-coverage, it may be construed a breach of duty for the insurer to continue to represent the insured. *See Martin v. Travelers Indem. Co.*, 450 F.2d 542 (5th Cir. 1971). In the instant case, the insurer began representation of the insured until USF&G was able to determined that the policies did not afford coverage for the incident. At that time, Morse notified Knight that he would have to retain other counsel. Knight testified that he consulted with Montgomery as soon as Morse indicated that USF&G would not continue a defense on Knight's behalf. Knight stated that he told Montgomery to do "whatever was necessary" to assist his defense. Indeed, Montgomery wrote several demand letters to USF&G for Knight and appeared at depositions as his attorney. The Court cannot consider that USF&G's actions prejudiced Knight as the insurer continued to deny coverage and took no steps in furtherance or opposition to Knight's defense after their denial.

II. Coverage Under the Policy

An insurance policy may limit coverage under any terms the company deems appropriate. In this case, USF&G limited their liability for non-owned automobiles to those used "solely for business purposes." The facts establish that the truck was no longer owned by Knight at the time of the incident and had been endorsed off the Knight policies, effective June 1, 1984. (Exh. D1-7.) Knight sold the truck to Brock approximately one month before the accident, and Brock had obtained coverage for the truck under his personal insurance policy. To determine whether coverage is available under the USF&G policy, the Court must determine whether Brock's use of the non-owned vehicle was solely for business purposes to trigger coverage under the USF&G BAP.

In this case, the Court is called upon to construe a contract for insurance. Interpretation of an insurance contract is a matter of law. *Putnam v. Insurance Co. of N. Am.*, 673 F.Supp. 171, 175 (N.D.Miss. 1987), *aff'd* 845 F.2d 1020 (5th Cir. 1988). The contract language governs the interpretation of the contract if the language is clear and specific. *Foreman v. Continental Casualty Co.*, 770 F.2d 487 (5th Cir. 1985). Words in a policy must be read in their ordinary sense and must be interpreted according to their plain meaning which a layman would accord them in an ordinary sense. *Mississippi Power & Light v. United Gas Pipeline*, 760 F.2d 618 (5th Cir. 1985).

The Court must look to the policy to determine who is an "insured" under the policy. In this case, the BAP includes the following provision:

> This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages apply only to those **autos** shown as covered **autos. Autos** are shown as covered **autos** for a particular coverage by the entry of one or more to the symbols from **Item THREE** next to the name of the coverage.

(Pls.' Exh. B., p. 4.) (emphasis in original.) The policy included the following statement under "Schedule of coverages and covered autos": Forms and Endorsements contained in this policy at its inception included the following: Jxn. 154-B, 287, CA 9917, 9903, 2128, 9921, 0001, Gen.166. (Pls.' Exh. B., p. 4.)

Liability insurance and uninsured motorists insurance contain the symbol "7". Item Three is the "Description of covered auto designation symbols" section of the policy which describes symbol "7" as follows:

> **SPECIFICALLY DESCRIBED AUTOS.** Only those **autos** described in **Item FOUR** for which a premium charge is shown and for liability coverage any **trailers you** don't own while attached to any power unit described in **Item FOUR.**

(Pls.' Exh. B., p. 5.)

Jxn. 154-B is the endorsements that provides as follows:

> It is agreed that the unqualified word 'insured' wherever it is used in Part IV – Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.

> Exceptions: *The following limitation does not apply* with respect to private passenger automobiles, or *to operation of other automobiles while being used solely for business purposes in connection with your business.*

(Jt. Exh. P-1 and D1-7.) (emphasis added.)

CA 9917 provided the following regarding coverage:

> 2. **PERSONAL AUTO COVERAGE**
>
> While any **auto you** own of the **private passenger type** is a covered **auto** under the LIABILITY INSURANCE:
>
> b. Any **auto you** don't own is a covered auto while being used by **you** or by any **family member** except:
>
> (4) Any **auto** other than an **auto** of the private passenger type used by **you** or by any of **your family members** while working in any other business or occupation.

(Jt. Exh. P-1 and D1-7.) (emphasis in original.)

"Business pursuits" generally include activities ordinarily pursued in anticipation of profit. If an insurance policy requires that the vehicle be used for only for business purposes to trigger coverage, courts have found this an enforceable limitation to the extension of coverage. *Utica Mutual Ins. Co. v. D.L. Dunn,* 129 S.E.2d 94 (Ga. 1962); *Hanover Ins. Co. v. Ransom,* 448 A.2d 399 (N.H. 1982); *Royal Globe Ins. Co. v. Fletcher,* 459 A.2d 255 (N.H. 1983); Appleman, *Insurance Law & Practice* (Buckley ed.) § 4326, pp. 472-478. Brock was employed by Knight at SKSF at Port Bienville, Mississippi. (Trans., p. 47.) He was on call 24 hours to guard the Port Bienville premises and

to tie up barges arriving at night. (*Id.*, p. 48.) He stayed on the premises in a trailer made available to him when he stayed to be available to tie up a barge and to guard the premises. (*Id.*, p. 49.) He stated he was paid $8.00 an hour; however, during cross examination Brock stated he received $300.00 per week for payment for services rendered to Knight. (*Id.*, pp. 49, 57-58.)

In a non-jury case, the Court must make findings and fact and credibility determinations. *Crosby-Mississippi Resources v. Florida Gas Transmission Co.*, 815 F.Supp. 977, 980 (S.D.Miss. 1993). The testimony, exclusive of self-serving testimony, establishes that Brock was not using the truck solely for the business purposes of SKSF at the time the accident occurred. Brock was not paid for the time spent traveling to Slidell for the purpose of obtaining his evening meal. *Smith v. Anderson-Tully Co.*, 608 F.Supp. 1143, 1146 (S.D.Miss. 1985), *aff'd* 846 F.2d 751 (5th Cir. 1988). Brock was on a personal mission at the time of the accident, with no connection to his employment. *Bradley v. Holmes*, 248 Miss. 44, 157 So.2d 801, 803 (1963). Traveling to or from work in itself is not enough to establish that the driver was within the scope of his employment invoking liability of his employer for his negligent driving without proof of special circumstances. *Mississippi Power & Light Co. v. Laney*, 247 Miss. 71, 154 So.2d 128, 133 (1963). The determination that an employee is acting within the scope of his employment is generally made using the same factors used in determining whether the employee was in the scope of his employment while driving the company's vehicle. *Mississippi Power*, 154 So.2d at 133 (citing 52 A.L.R.2d at 287-301.) Generally, an employee going and coming from

work is not considered within the scope of his employment. *Id.*, p. 134. Mere returning to the job site after partaking of a meal is not sufficient to establish liability on the part of the employer, without evidence that the employer was no paid an allowance for the use of the car. *Id.*

Brock had worked at Knight's gravel pit operation in Nicholson, Mississippi, during the day of the accident. (*Id.*, p. 50.) Brock went to Port Bienville to collect his pay and at that time, Knight informed Brock that he needed to be at the facility that evening to tie up barges which were expected at the facility. (*Id.*)

Brock informed Knight that he was planning to go to Slidell, Louisiana, to eat. (*Id.*) Brock was told he could leave the job site and return in time to tie up the barge. (*Id.*) Brock went to Slidell, stopped at his friend's home to invite her to eat, then proceeded to the restaurant. (*Id.*, p. 51.) Brock started back to Port Bienville, stopping at the Time Saver store to purchase two beers. (*Id.*) Brock states he was being paid for his activities at the time of the accident. (*Id.*)

As previously stated, Brock was using his personal vehicle at the time the accident happened. (*Id.*, p. 49.) The testimony established that Brock purchased the truck from Knight about two months prior to the accident. (*Id.*, pp. 49, 58.) Knight had transferred title to the vehicle to Brock to enable Brock to obtain financing on the truck. (*Id.*, p. 92.)

Knight testified that Brock stayed at the Port Bienville facilities when he was working. (*Id.*, p. 94.) On cross examination, Knight was questioned about deposition

testimony he gave in 1988 in which he stated there was not a barge expected at the Port Bienville facility on the night of the accident. (*Id.*, pp. 95-96.) Knight stated he made a mistake in the 1988 testimony. (*Id.*, pp. 96-97.)

There is no evidence that Brock was paid for his time travelling to Slidell, or that Brock was acting under Knight's control or specific directions. Brock's "mission" for his employer was to tie up the barges when the barges arrived at the Port Bienville facility. In order to accomplish this "mission" Brock had to reach the facility. The Buice accident occurred before Brock reached Port Bienville. Therefore, there is no evidence that Brock's trip in his private truck was "solely" for business purposes. *Seedkem South, Inc. v. Lee*, 391 So.2d 990 (Miss. 1980); *see Luther McGill, Inc. v. Cook*, 306 So.2d 304, 306 (Miss. 1975); *Price v. Colony Ins. Co.*, 520 So.2d 964, 966-67 (La. 1987), *writ denied* 522 So.2d 561. The Court has been unable to find cases wherein an employee travelling on a personal mission is found acting for the business purposes of his employer. *See S. & W. Constr. Co. v. Bugge*, 194 Miss. 822, 13 So.2d 645 (Miss. 1943); *Beard v. Seamon*, 175 So.2d 671 (La. 1965); *Fidelity & Casualty Co. of N.Y. v. Carpenter*, 234 F.2d 528 (5th Cir. 1956) (La. law); *Barr v. Colorado Interstate Gas Co.*, 217 F.2d 85 (5th Cir. 1954) (Tx. law); *Pilgrim v. Fortune Drilling Co.*, 653 F.2d 982 (5th Cir. 1981) (Tx. law). The Court concludes there was no coverage for the incident under Knight's insurance policies.

The default judgment, entered a year and eight months after USF&G's withdrawal, was rendered without opposition to the assertions that Brock was acting "within the scope of his employment" at the time of the accident. (Trans., p. 382; Chi-38, p. 2.) Generally, denial of liability

is estopped when the insurer withdraws from the defense of the insured, if the insurer's conduct results in prejudice to the insured. *Southern Farm Bureau Casualty Ins. Co. v. Logan*, 238 Miss. 580, 119 So.2d 268 (1960). Knight went to another attorney after USF&G withdrew from his defense. Neither Knight nor the attorney appeared on Knight's behalf when the default judgment was entered. This unfortunate turn of events cannot, however, be attributed to USF&G's withdrawal. *But see Pacific Indem. Co. v. Acel Delivery Serv., Inc.*, 485 F.2d 1169 (5th Cir. 1973), *cert. denied* 415 U.S. 921 (1974).

The Mississippi Supreme Court has indicated that the doctrine of waiver cannot extend contract coverage where coverage does not exist. *See Lockard*, 124 So.2d at 854 (citing *Carnes & Co. v. Employers' Liab. Assurance Corp.*, 101 F.2d 739 (5th Cir. 1939)). The language of the policy clearly provides coverage if the non-owned automobile is used "solely for business purposes." If an insurance contract is written in unambiguous language, the contract is construed as written. *Ford v. Lamar Life Ins. Co.*, 513 So.2d 880, 886 (Miss. 1987).

Brock was not using his truck "solely" for Knight's business. The original complaint filed in this action alleged that Brock was the cause of the accident. It was not until the amended complaint was filed on December 27, 1988, that Knight was accused of letting Brock use the truck in the scope of his employment. In response to plaintiff's motion to amend, USF&G had renewed its motion to withdraw on December 7, 1988. The Court entered an order relieving Morse as attorney of record in this case on January 23, 1989.

USF&G undertook Knight's defense at the outset of the case as coverage was questionable and withdrew immediately upon discovering that coverage did not extend to the vehicle or driver involved in the fatal accident. USF&G's behavior was appropriate under the circumstances. *See Fidelity & Casualty Co. of N.Y. v. Riley,* 380 F.2d 153, 157 (5th Cir. 1967) (citing cases).

III. Chicago's Liability

Chicago's answer to the writ of garnishment included a denial of indebtedness to Knight, denial of having any effects of the defendant in its control, denial of knowledge of any persons indebted to Knight or of any other persons who have any effects of the defendant in their control. (Ans. and Defenses of Chicago Insurance Co.) Chicago also asserted that they received no notice of the claim until after the default was entered, with notice allegedly being a condition precedent to their liability under the policy. Chicago also denied coverage under the policy for the claim and asserts that if liability is established, their portion of liability is only the excess of the underlying insurance.

Chicago's named insured was not a party to this action until December 27, 1988, when the Buice estate filed its amended complaint naming Steve Knight, Jr. d/b/a Steve Knight Steel Fabricators. (Exh. Chi-3.) Chicago's insurance policy provided that the underlying coverage was provided by USF&G. (Exh. P-4, p. 2.) The policy also provides in pertinent part as follows:

III. Definition of Insured, Named Insured

The "named insured" means the person or organization named in the declarations and includes any subsidiary thereof and any other organization coming under the named insured's control or which it assumes active management.

The unqualified word "insured" includes the named insured and also includes:

(b) except with respect to the ownership, maintenance or use, including loading or unloading, or automobiles wile [sic] away from premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, (1) any employee of the named insured while acting within the scope of his duties as such; or (2) any person or organization acting as agent with respect to real estate management for the named insured;

(Exh. P-4, p. 8.)

The Buice accident did not happen on Knight's premises. Furthermore, the Court has found that Brock was not acting for "business purposes" at the time of the accident. Therefore, the Court finds that there was no coverage for the incident within Chicago's policy. Therefore, there is no cause to issue a writ of garnishment against Chicago in this circumstance.

In absence of information supporting coverage under the policy provisions for the accident underlying this lawsuit, the Court finds that USF&G and Chicago do not hold any of the judgment debtor's property and releases USF&G and Chicago from the writ of garnishment issued in this case.

Conclusion

For the reasons discussed herein, the Court finds that the accepted facts and law support the release of USF&G and Chicago from the writ of garnishment issued in the instant case.

Counsel for USF&G shall submit an order in conformity with and incorporating by reference the foregoing Memorandum Opinion within ten (10) days of the date of entry hereof. Each party shall bear their/its own costs.

DATED this the 20th day of April, A. D., 1994.

/s/ Walter Gex III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE, DECEASED, WILLIAM RAMSEY BUICE, ADMINISTRATOR — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0517(G)

STEVE KNIGHT, JR., STEEL FABRICATORS, INC., and/or STEVE KNIGHT, JR., Individually d/b/a STEVE KNIGHT, JR., STEEL FABRICATORS, INC. and TIME SAVER STORES, INC. — DEFENDANTS

REPORT AND RECOMMENDATION

(Filed Jun. 1, 1990)

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI:

The undersigned, United States Magistrate, to whom this cause stands referred for the purpose of hearing the evidence and determining the issue of damages between the parties and making his report and recommendation to the Court, separately stating Findings of Fact and Conclusions of Law, having heard the evidence, in the presence of the parties and their counsel, and the argument of counsel of the parties, upon the issue of damages between the parties, submits as follows:

I.

That Mary Virginia Buice, a white female, was born on March 3, 1962. On July 6, 1984, Mary Virginia Buice was 22 years old and a single person. She was a full-time

student majoring in Business Administration at the University of Southern Mississippi. She was fluent in the languages of Spanish and French and her goal was to pursue a career in international management. On July 6, 1984, Mary Virginia Buice was killed in an automobile accident as the result of the negligence of Gary Brock.

II.

That at the time of the accident, Gary Brock was driving under the influence of alcohol and was acting within the course and scope of his employment by Steve Knight, Jr., Individually d/b/a Steve Knight, Jr., Steel Fabricators Inc.

III.

That Defendant, Steve Knight, Jr., Individually, and Steve Knight, Jr., Steel Fabricators, Inc., are jointly and severally liable for damages to the Plaintiff for the death of Mary Virginia Buice.

IV.

That the Estate of Mary Virginia Buice has received the sum of Twenty-Nine Thousand Dollars ($29,000.00) from a settlement with Time Saver, Inc. and the sum of Twenty-Five Thousand Dollars ($25,000.00) from a settlement with Gary Brock. That the settlement documents in each instance reserved a right of action against Steve Knight, Jr. and Steve Knight, Jr., Steel Fabricators, Inc.

V.

CONCLUSIONS OF LAW

Under the law of Mississippi, the following elements of damages as are shown by the evidence may be awarded for the wrongful death of a decedent:

1. The loss of the society and companionship of deceased to her survivors. $200,000.00

2. The present net cash value at the time of death of deceased's life expectancy. $424,591.00

3. Pain and suffering endured by the deceased prior to her death. $00.00

4. Any reasonable medical expenses incurred by the Estate of Mary Virginia Buice. $00.00

5. Reasonable funeral expenses incurred by the Estate of Mary Virginia Buice. $3,000.00

6. Any damage to personal property owned by Mary Virginia Buice. *Galloway v. Korzewka,* 346 F.Supp. 1086 (N.D. Miss. 1972); *Thornton v. Ins. Co. of N. Am.,* 287 So.2d 262 (Miss. 1973); *Dickey v. Parham,* 295 So.2d 284 (Miss. 1974). $00.00

Based on the foregoing Findings of Fact and Conclusions of Law, I recommend that judgment be granted in accordance with the above in favor of the Estate of Mary Virginia Buice in the sum of $573,591.00, compensatory damages, and $600,000.00, punitive damages. This judgment reflects a credit of Fifty-Four Thousand Dollars ($54,000.00) for prior payments by joint tortfeasors.

RESPECTFULLY RECOMMENDED, this the 31st day of May, 1990.

/s/ Britt Singletary
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTATE OF MARY VIRGINIA BUICE, DECEASED, WILLIAM RAMSEY BUICE, ADMINISTRATOR — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0517(G)

STEVE KNIGHT, JR., STEEL FABRICATORS, INC., and/or STEVE KNIGHT, JR., Individually d/b/a STEVE KNIGHT, JR., STEEL FABRICATORS, INC. and TIME SAVER STORES, INC. — DEFENDANTS

DEFAULT JUDGMENT UPON ASSESSMENT OF DAMAGES BY MAGISTRATE

(Filed Jun. 18, 1990)

This Court having ordered that the Plaintiff herein recover of the Defendant, Steve Knight, Jr., Individually, and Steve Knight, Jr., Steel Fabricators, Inc., the damages sustained by him and that an inquest be taken before United States Magistrate to assess the Plaintiff's damages and that upon rendering of a report and recommendation by the United States Magistrate Britt Singletary, judgment be entered in accordance therewith; and that this cause having been regularly brought on for inquest on the 23rd day of May, 1990, before the United States Magistrate, after due notice thereof to said Defendant, and the United States Magistrate having rendered a report and recommendation that judgment be entered in favor of the Plaintiff and against the Defendant, Steve Knight, Jr.,

Individually and Steve Knight, Jr., Steel Fabricators, Inc., in the sum of $1.173,591.00.

It is

ORDERED AND ADJUDGED that the Plaintiff recover of the Defendant, Steve Knight, Jr., Steel Fabricators, Inc., and Steve Knight, Jr., Individually, the sum of $1,173,591.00 with legal interest from date, together with all costs.

DATED, this the 18th day of June, 1990.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60384

ESTATE OF MARY VIRGINIA BUICE, Deceased
and WILLIAM RAMSEY BUICE, Administrator
of Estate of Mary Virginia Buice, Deceased,

Plaintiffs-Appellants,

versus

STEEL FABRICATORS, ET AL.,

Defendants,

UNITED STATES FIDELITY & GUARANTY INSURANCE CO.,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING

(Filed Apr. 8, 1996)

Before LAY*, HIGGINBOTHAM and STEWART, Circuit Judges.

---

* Circuit Judge of the Eight Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
Patrick E. Higginbotham
United States Circuit Judge

No. 96-49

Supreme Court, U.S.
FILED
AUG 9 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ESTATE OF MARY VIRGINIA BUICE, DECEASED and WILLIAM RAMSAY BUICE, ADMINISTRATOR OF THE ESTATE OF MARY VIRGINIA BUICE, DECEASED,

Petitioners,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RAYMOND L. BROWN
Counsel of Record
A. KELLY SESSOMS
BROWN, WATT & BUCHANAN, P.A.
Attorneys for Respondent
3112 Canty Street
P.O. Box 2220
Pascagoula, Mississippi 39569-2220
(601) 762-0035

9368
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

25 pp

QUESTION PRESENTED

1. Whether a judgment creditor in a garnishment action against a judgment debtor's insurer may rely upon collateral estoppel to preclude the insurer from litigating coverage when the courts below found no duty to defend the insured and also found no coverage.

LIST OF PARTIES

Estate of Mary Virginia Buice, Deceased — *Petitioner*

William Ramsay Buice, Administrator of Estate of Mary Virginia Buice, Deceased — *Petitioner*

Logan & Bise — *Attorneys for Petitioner*

United States Fidelity & Guaranty Company — *Respondent*

Brown, Watt & Buchanan, P.A. — *Attorneys for Respondent*

Pursuant to Supreme Court Rule 29(6), United States Fidelity & Guaranty Company's parent company is United States Fidelity & Guaranty Corporation and its non-wholly owned subsidiaries are as follows:

1. Ballston U.S.F. & G. Holding Company, Inc.; and

2. TNP Office, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of the Case	1
Reasons for Denying the Writ	10
I. There Are No Compelling Reasons For This Court To Review The Fifth Circuit's Ruling Based Upon Well-Settled Principles of Mississippi Insurance Law.	10
II. Buice's Alleged "Conflict" Among The Circuits Does Not Warrant Certiorari Review.	11
III. Collateral Estoppel Does Not Operate To Bar Litigation Of Coverage Issues As U.S.F. & G. Owed No Duty To Defend.	12
IV. Lower Court Correctly Determined There Was No Coverage Under The Business Auto Policy.	16
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

American Casualty Co. v. United Southern Bank, 950 F. 2d 250 (5th Cir. 1992) 11

Columbia Mut. Ins. Co. v. Fiesta Mart, Inc., 987 F. 2d 1124 (5th Cir. 1993) 16

Constant v. United States, 929 F. 2d 654 (Fed. Cir. 1991) 13

Enserch Corp. v. Shand Morahan & Co., 952 F. 2d 1485 (5th Cir. 1992) 15, 16

Erie v. Tompkins, 304 U.S. 64 (1938) 19

Hartford Casualty Co. v. Cruse, 938 F. 2d 601 (5th Cir. 1991) 15

Illinois Central Gulf R.R. Co. v. Int'l Paper, 889 F. 2d 536 (5th Cir. 1989) 13

Knight v. U.S.F. & G., 65 F. 2d 34 (5th Cir.), *cert. denied*, __ U.S. __, 116 S. Ct. 1418 (1996) 13

McCarty v. Parks, 564 P. 2d 1122 (Utah, 1977) 19

McIntosh v. Johnson, 649 So. 2d 190 (Miss. 1995) 11

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) ... 10

Contents

	Page
Pierson v. Ray, 386 U.S. 457 (1967)	10
Sentinel Ins. v. First Ins. of Hawaii, 875 P. 2d 894 (Hawaii 1994)	19
Southern Farm Bureau Casualty Co. v. Logan, 238 Miss. 580, 119 So. 2d 268 (1960)	13
Terrell v. DeConna, 877 F. 2d 1267 (5th Cir. 1989)	11, 19
Travelers Ins. v. St. Jude Hospital of Kenner, LA, 37 F. 3d 193 (5th Cir. 1994), *reh'g denied*, 41 F. 3d 1666, *cert. denied*, __ U.S. __, 115 S. Ct. 1696 (1995)	12
Statute Cited:	
28 U.S.C. § 1254(1)	1
Rule Cited:	
Supreme Court Rule 10	10

OPINIONS BELOW

Petitioners, Estate of Mary Virginia Buice, Deceased, and William Ramsay Buice, Administrator of the Estate of Mary Virginia Buice, Deceased (hereinafter "Buice"), instituted a garnishment action against Respondent, United States Fidelity & Guaranty Company (hereinafter "U.S.F. & G."), in the United States District Court For The Southern District Of Mississippi. On April 12, 1994, the District Court entered its bench opinion releasing U.S.F. & G. from the writ of garnishment.

The United States Court of Appeals For The Fifth Circuit entered its *per curiam* judgment affirming the District Court's ruling on March 7, 1996. Buice moved for a rehearing of this judgment which was denied on April 8, 1996. Buice has sought review of the Fifth Circuit's judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is one of three actions filed as a result of a highway accident. They were (1) a wrongful death action which resulted in a default judgment against Steve Knight and his businesses, (2) a bad faith action by Knight against United States Fidelity & Guaranty Company, claiming there was coverage and a duty to defend, and (3) a garnishment action against United States Fidelity & Guaranty Company by the Buice estate attempting to collect on the default judgment against Knight.

Briefly stated, in the bad faith suit filed by Knight, the District Court held there was no coverage and no duty to defend, and that decision was affirmed by the Fifth Circuit. Certiorari was denied. The District Court, in the garnishment action, dismissed the garnishment, and the Fifth Circuit affirmed. Certiorari is now sought by Petitioner, claiming issue preclusion from the original wrongful death suit.

Petitioner Buice initially filed a wrongful death action against Steve Knight, Jr. Steel Fabricators, Inc. and Steve Knight, Jr., Individually, d/b/a Steve Knight, Jr. Steel Fabricators, Inc. ("Knight"), for the death of Mary Virginia Buice. The Complaint, filed on August 17, 1987, alleged that Gary Brock, an employee of Knight, pursuant to the course and scope of his employment by Knight, struck and killed Ms. Buice on July 6, 1984. (R. 1).

Knight conducted business operations known as Steve Knight Jr. Steel Fabricators, Inc. Knight operated a gravel pit in Nicholson, Mississippi, and owned a steel barge fabrication plant at Port Bienville in Pearlington, Mississippi. Gary Brock was an employee of Knight during July of 1984.

Respondent, U.S.F. & G., had in effect three (3) policies for Knight's business during the period November 11, 1983 to November 10, 1984: a business auto policy, No. BAP1401146688; a trucker's policy, No. 026084300; and a general liability policy, No. 025165294. (R. 1252). Burt Young, of the Crystal Springs Insurance Agency, an authorized U.S.F. & G. agency, was the agent that sold, collected the premiums, and received a commission on all of the business insurance policies for Knight's business.

Regarding coverage by U.S.F. & G., the business auto policy issued to Knight contained an endorsement JXN154-B, which provided that:

> It is agreed that the unqualified word "insured" wherever it is used in Part IV - Liability Insurance includes only you and any organization legally responsible for the use of your automobile, provided the actual use of the automobile is by you or with your permission.

> Exceptions: The foregoing limitation does not apply with respect to private passenger automobiles, or to operation of other automobiles while being used *solely for business purposes in connection with your business.*

(Emphasis added) (R. 850). The above restrictive non-owned vehicle endorsement would have provided coverage only if Brock's vehicle was being used "solely" for the business purposes of Knight at the time of the accident.

On the night of the accident, Brock was driving his own personal pickup truck. Brock had purchased the pickup truck that he was driving from Knight, his employer, about two months prior to the accident. (T. 58). Knight had transferred title to the pickup to Brock to enable Brock to obtain financing on the vehicle. (T. 92). The truck was removed by endorsements from Knight's business auto policy on June 1, 1984. Brock had obtained a liability insurance policy on the pickup with Reliance Insurance. The policy limits on the Reliance coverage were subsequently paid to the Buice Estate.

The accident occurred late Friday night on July 6, 1984, when Gary Brock, driving his own personal pickup, and driving while intoxicated, drove down the wrong side of Highway 90 and struck the vehicle of Mary Virginia Buice, resulting in her death.

On the date of the accident, Gary Brock had worked at Knight's gravel pit in Nicholson, Mississippi. (T. 50). That evening, Brock went over to Port Bienville in Pearlington, Mississippi, to collect his pay. Upon arrival in Pearlington, Brock took a shower, cleaned up, and changed clothes. (T. 55). It was here at Knight's operation in Pearlington that Brock was able to use the services of a trailer on the premises which

contained living accommodations and a kitchen, complete with a table and groceries. (T. 55). Brock was living at this trailer at the time of the accident. (T. 56).

After having been paid, and following a change of clothes and cleaning up, Brock decided to go to Slidell, Louisiana. (T. 56). Brock stated that he went to Slidell every Friday. *Id.* Brock testified that he went by one Brenda Hamilton's house to see her. (T. 57). Brock then went to Catfish Charlie's to eat dinner and have some beer. *Id.* After eating, Brock stopped at a Time Saver convenience store, purchased some more beer, and then headed back to Mississippi. *Id.* Subsequently, Brock crossed the center line on Highway 90 and collided with Ms. Buice's vehicle, resulting in her death.

Brock stayed at the Port Bienville property when he was working for Knight. (T. 94). Knight testified that Brock stayed in a trailer on the Port Bienville premises as part of his salary. (T. 98). Knight stated that the reason Brock had to come back from Slidell to Mississippi was for the purpose of meeting a barge that night. (T. 94). After being confronted with contradictory deposition testimony that he gave in 1988, in which he stated that there was not a barge expected at the Port Bienville site, Knight stated that he made a mistake in his earlier testimony. (T. 96). Knight continued in explaining that he was in bankruptcy at the time and had just lost his representation from an insurance company. (T. 96).

Glenda Hunnicutt, Knight's secretary, notified Burt Young, the agent, of the accident the following Monday. (T. 60). Hunnicutt stated that Knight stopped by her house on Saturday and told her about the accident. (T. 67). Knight further told Hunnicutt to call Burt Young the following Monday and report the accident. *Id.* Hunnicutt spoke with Burt Young's secretary, Gay Powell, and informed her of the accident. (T. 68).

Hunnicutt then spoke with Young concerning the accident. Hunnicutt understood that Young would "handle it." (T. 68). Hunnicutt testified that she did not discuss with Knight whether Brock was in fact on duty or doing something for the company at the time of the accident. (T. 72).

Knight had several policies with Respondent, United States Fidelity and Guaranty Company, at the time of the accident. U.S.F. & G. hired attorney Stanford Morse to represent Knight and an answer was filed on August 15, 1988. (R. 118). The answer admitted that Brock was negligent, was under the influence of intoxicating beverages, but denied that Brock was acting in the course and scope of his employment at the time of the accident. Subsequently, it was determined by U.S.F. & G. that there was no coverage for the vehicle being driven by Brock at the time of the accident and that Morse should withdraw from Knight's defense. (R. 132).

Knight did not tell U.S.F. & G. or Burt Young when he was sued by the Buice Estate. (T. 101). Knight testified that his only contact with U.S.F. & G. was through Stanford Morse, the attorney hired by U.S.F. & G. to represent Knight. (T. 103). Knight met with Stanford Morse regarding coverage under the applicable policies. (T. 103). Knight testified that Morse instructed him to retain a lawyer. (T. 103). Morse subsequently was allowed by the court to withdraw as counsel for Knight. (R. 243).

Forrest Holder, Sr., a former claims office supervisor for U.S.F. & G., with 35 1/2 years in the insurance industry, testified that in 1988 he became aware of the Buice accident. (T. 243-44). Holder determined that there was no coverage afforded the Brock vehicle under any of the U.S.F. & G. policies in effect at the time. (T. 246). Holder testified that the Brock vehicle was not listed on the trucker's policy or the BAP. (T. 246-47). He

continued by stating that the comprehensive general liability policy did not extend coverage to automobiles. (T. 247). Holder opined that the business auto policy's restrictive non-owned vehicle endorsement did not provide coverage because the vehicle was not being used solely for business purposes at the time of the accident. (T. 248).

Darwin Ezell, a claims adjuster with 27 years of experience at U.S.F. & G., stated that it was his determination that there was no coverage under the policies. (T. 277). With respect to the information U.S.F. & G. possessed relative to the facts of the accident, Ezell stated that U.S.F. & G. had a copy of the investigating officer's report, of Brock's insurance policy, and had knowledge of the facts of Brock's previous manslaughter case arising out of the accident, along with copies of the three relevant policies issued to Knight at the time U.S.F. & G. determined that there was no coverage. (T. 284).

The Buice Estate filed an Amended Complaint on or about December 27, 1988. (R. 228). Morse was then allowed to withdraw as counsel of record for Knight by court order of January 23, 1989. (R. 243).

On March 30, 1989, the Estate of Buice filed its Motion to Strike Answers And Enter Default As To Knight. (R. 290). The District Court entered a default judgment in the amount of $1,173,591 against Knight on June 18, 1990. (R. 452). The judgment, based on the Magistrate Judge's Report and Recommendation, found the accident was caused by Brock's negligence and that Brock was in the course and scope of his employment with Knight at the time of the accident. (R. 449-51). Issues of policy coverage were not addressed in either the Report and Recommendation or the judgment. The court did not rule as to coverage.

Following Morse's withdrawal, Knight went and talked to attorney Joe Montgomery. (T. 103). Knight stated that no other attorney appeared on Knight's behalf to defend him in the Buice lawsuit. (T. 104). Knight received several letters from Morse after his withdrawal advising a default was about to be taken. (T. 104). Knight stated that Joe Montgomery also got some letters from Morse. Knight authorized Montgomery to "do anything you need to do" on Knight's behalf in the suit. (T. 104, 116). Montgomery appeared as counsel for the Plaintiff in Young's deposition held on October 24, 1989. (R. 1258). Montgomery also appeared on Knight's behalf at several Rule 30(b)(6) depositions taken in Chicago, Illinois. (R. 1259). Nevertheless, Knight took no action to defend himself and a default judgment was taken in June of 1990 for $1,173,591.

On September 26, 1990, the Estate of Buice filed a suggestion of writ of garnishment on judgment against U.S.F. & G. and excess carrier Chicago Insurance Company ("Chicago").[1] (R. 454). The suggestion for writ of garnishment contained no language regarding the proposition that U.S.F. & G. or Chicago were somehow precluded from contesting matters of coverage as a result of the default judgment. (R. 1268).

On November 19, 1991, the Buice Estate moved for partial summary judgment based in part of Knight's answer to the original Complaint and the Magistrate's Report and Recommendation. (R. 622). On March 10, 1992, the District Court denied Buice's Motion for Partial Summary Judgment in its Memorandum Opinion. (R. 725). Specifically, the court held that there was "a material question of fact as to whether the vehicle was used *solely* for business purposes" as described in the endorsement JXN154-B to the business auto policy. The court went on to state that the use of Brock's vehicle for personal

1. Pursuant to a joint motion by the Buice Estate and Chicago, Chicago was dismissed from this matter by entry of dismissal dated March 21, 1996.

reasons "gives rise to a question of fact as to whether the vehicle was covered under the provisions of the policy in effect at the time of the accident." (R. 729). The Buice Estate moved for reconsideration or, alternatively, for interlocutory appeal, but this was denied by the Court. (R. 945). In denying Buice's motion, the Court's Memorandum Opinion of September 25, 1992 explained its reasonings:

> Although the Memorandum Opinion issued by the United States Magistrate Judge indicated that Brock was acting within the scope of his employment at the time of the accident, the opinion also indicates that Brock had been on a personal mission prior to the accident. The use of the personal vehicle for personal reasons gives rise to questions of fact as to whether the vehicle was covered under the provisions of the policy in effect at the time of the accident.

(R. 947). The Court continued to hold that there were "insufficient facts for determination of whether U.S.F. & G. had a duty to defend in the first lawsuit and whether that duty was breached by some actions taken by U.S.F. & G. during that suit." (R. 948).

Knight subsequently brought a bad faith lawsuit against U.S.F. & G. for alleged wrongful failure to defend in the Buice matter. The Knight bad faith action was consolidated then later severed for purposes of trial from the Buice garnishment action. On October 12, 1992, U.S.F. & G. filed a motion for summary judgment as to Knight's bad faith claims. On November 16, 1994, the District Court granted summary judgment to U.S.F. & G. after finding that its actions in withdrawing its defense of Knight were reasonable according to law and did not

rise to the level of malice or gross negligence and reckless disregard sufficient to trigger punitive damages. The court further held that U.S.F. & G. had an arguable reason to deny the claim at the time it made the decision to withdraw from Knight's defense. On November 29, 1994, the District Court entered judgment dismissing Knight's action against U.S.F. & G. with prejudice.

Knight appealed to the Fifth Circuit, and, on or about September 21, 1995, the Court of Appeals entered its judgment and opinion affirming the District Court's judgment. After Knight filed his petition for rehearing, the Fifth Circuit entered its order denying the petition on November 2, 1995. Knight then filed a petition for writ of certiorari which this Court denied on or about April 15, 1996.

On November 16, 1992, the Buice Estate resubmitted its Motion for Partial Summary Judgment. (R. 1109). Buice asserted that the underlying facts regarding the accident of July 6, 1984 were allegedly sufficient to establish a duty to defend on the part of U.S.F. & G. and that U.S.F. & G. had breached such duty. Buice's resubmitted Motion for Partial Summary Judgment was also denied by the court.

On December 14 and 15, 1992, the garnishment action was heard before the Honorable Walter J. Gex, III, District Judge for the Southern District of Mississippi. On April 21, 1994, the District Court entered its Bench Opinion releasing U.S.F. & G. and Chicago from the garnishment action, specifically finding that Brock was on a personal mission at the time of the accident and that Brock was not using his pickup truck "solely for business purposes" which might otherwise trigger coverage under the business auto policy. (R. 1273).

A judgment was entered on or about May 4, 1994. (R. 1280).

The Buice Estate filed a Notice of Appeal on May 25, 1994. (R. 1281). After oral argument, the Fifth Circuit entered its *per curiam* judgment affirming the District Court's ruling on March 7, 1996. Buice moved for a rehearing of this judgment which was denied on April 8, 1996. Buice filed the present Petition for Writ of Certiorari on July 8, 1996.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS FOR THIS COURT TO REVIEW THE FIFTH CIRCUIT'S RULING BASED UPON WELL-SETTLED PRINCIPLES OF MISSISSIPPI INSURANCE LAW.

The present controversy between a judgment creditor in a garnishment action and an insurer is not the type of case worthy of this Court's limited judicial resources. The Fifth Circuit and the District Court both found under well-settled principles of Mississippi insurance law that there was no coverage under the business auto policy issued to Knight for Buice's garnishment claims. Buice's petition should be denied as this Court does "not ordinarily review the holding of a court of appeals on a matter of state law." *Pierson v. Ray,* 386 U.S. 457, 559 n. 12 (1967). Further, this Court will "generally accord great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 484 n. 13 (1986).

Essentially, Buice maintains that the lower court misapplied rules of issue preclusion in successive diversity actions. This Court should decline certiorari jurisdiction as such a writ "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

II.

BUICE'S ALLEGED "CONFLICT" AMONG THE CIRCUITS DOES NOT WARRANT CERTIORARI REVIEW.

Buice maintains that there is a conflict among the federal circuits regarding whether to apply federal or state rules of preclusion of a federal diversity judgment in a subsequent federal diversity action. Buice concedes that the majority rule, as is the case in the Fifth Circuit, is that "when a federal court renders a decision in a diversity case, the decision's preclusive effect is measured by federal principles of preclusion." *Terrell v. DeConna*, 877 F. 2d 1267, 1270 (5th Cir. 1989).

Buice contends that the District Court erroneously applied the principles of federal collateral estoppel to the facts of this case. Specifically, Buice asserts that the issue of employment status of Brock at the time of the accident was precluded by the previous default judgment determination which found that he was in the course and scope of his employment at the time of the accident. Buice then goes on to argue that the substantive laws of the state of Mississippi governing indemnitor/indemnity collateral estoppel should have been applied here. Buice has not cited, nor can counsel for U.S.F. & G. locate, any case authority setting forth the alleged substantive law governing indemnitor/ indemnity collateral estoppel. However, under both federal and state rules of collateral estoppel, such doctrine "only bars matters actually litigated in the prior action." *McIntosh v. Johnson*, 649 So. 2d 190, 193 (Miss. 1995); *American Casualty Co. v. United Southern Bank*, 950 F. 2d 250, 253 (5th Cir. 1992). In this matter, the question of coverage was not litigated at the default judgment stage. Such matters were litigated, however, in the garnishment action with the result being a correct finding by the court that no coverage existed.

The application of state or federal collateral estoppel was not warranted under the facts of this case. Simply put, the District Court's analysis of federal collateral estoppel as opposed to state collateral estoppel would have yielded the same result had the latter doctrine applied. The fact of the matter is that coverage was not actually litigated in the default judgment, therefore U.S.F. & G. was properly entitled to rely upon the exclusion in the business auto policy during the subsequent garnishment trial. Buice's reference to an asserted conflict in the federal circuits avails it little. Even so, this Court has recently passed upon the opportunity to disturb the majority rule, as found in the Fifth Circuit, that federal *res judicata* rules apply in resolving the preclusive effect of prior diversity actions. *Travelers Ins. v. St. Jude Hospital of Kenner, LA*, 37 F. 3d 193 (5th Cir. 1994), *reh'g denied*, 41 F. 3d 1666, *cert. denied*, __U.S.__, 115 S. Ct. 1696 (1995).

Buice's concern of an alleged split in the federal circuits over which rule of collateral estoppel to apply, in an attempt to vest this Court with jurisdiction, amounts to a red herring. Buice eventually sets forth the applicable rule that in order to make out a *prima facie* case of collateral estoppel on a coverage issue, the plaintiff must first show that the insurer had a duty to defend its insured in the underlying action. (Pet. 15.) U.S.F. & G.'s alleged duty to defend Knight in the underlying Buice action will now be discussed.

III.

COLLATERAL ESTOPPEL DOES NOT OPERATE TO BAR LITIGATION OF COVERAGE ISSUES AS U.S.F. & G. OWED NO DUTY TO DEFEND.

Essentially, Buice argues that U.S.F. & G. had a duty to defend Knight in the Buice action, and that since U.S.F. & G.

chose to withdraw from that defense, it is estopped to raise coverage exclusions under the policy. Buice cites *Southern Farm Bureau Casualty Co. v. Logan,* 119 So. 2d 268 (Miss. 1960) for the proposition that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not estopped to do so if its action does not result in any prejudice to the insured. U.S.F. & G. submits that this is the real collateral estoppel rule that Buice inartfully tries to misapply in its petition. Nevertheless, the District Court has already ruled in the Knight bad faith action that there was no duty upon U.S.F. & G. to defend Knight in the Buice lawsuit. The District Court's ruling was affirmed by the Fifth Circuit by reported opinion in *Knight v. U.S.F. & G.,* 65 F. 2d 34 (5th Cir.), *cert. denied,* __U.S. __, 116 S. Ct. 1418 (1996), and Knight's petition for writ of certiorari in that matter was denied by this Honorable Court. Buice devotes much of its petition to rehashing the law regarding an insurer's duty to defend and its contentions that there was such a duty under the facts of the Buice accident.

The duty to defend argument is foreclosed by the law of the case doctrine. This doctrine holds that "an issue of law or fact decided on appeal may not be reexamined either by the District Court on remand or by the appellate court on a subsequent appeal." *Illinois Central Gulf R.R. Co. v. Int'l Paper,* 889 F. 2d 536, 539 (5th Cir. 1989). Further, the denial of the petition for writ of certiorari in the Knight bad faith action arguably makes the legal conclusions of the Court of Appeals' prior decision final and the law of the case, and Buice is barred from attempting to relitigate them. *Constant v. United States,* 929 F. 2d 654, 657 (Fed. Cir. 1991).

Assuming *arguendo* there was a duty to defend, which U.S.F. & G. and all three courts have expressly found is not the case, there has been no showing of prejudice against the insured

to warrant an estoppel. The District Court discussed the issue of prejudice in its ruling:

> In the instant case, the insurer began representation of the insured until U.S.F. & G. was able to determine that policies did not afford coverage for the incident. At that time, Morse notified Knight that he would have to retain other counsel. Knight testified that he consulted with Montgomery as soon as Morse indicated that U.S.F. & G. would not continue a defense on Knight's behalf. Knight stated that he told Montgomery to "do whatever was necessary" to assist his defense. Indeed, Montgomery wrote several demand letters to U.S.F. & G. for Knight and appeared at depositions as his attorney. *The Court cannot consider that U.S.F. & G.'s actions prejudiced Knight as the insurer continued to deny coverage and took no steps in furtherance or opposition to Knight's defense after their denial.*
>
> * * *
>
> The default judgment, entered a year and eight months after U.S.F. & G.'s withdrawal was rendered without opposition to the assertions that Brock was acting "within the scope of his employment" at the time of the accident. (Trans., p. 382; Chi - 38, p. 2.) Generally, denial of liability is estopped when the insurer withdraws from the defense of the insured, if the insurer's conduct results in prejudice to the insured. *Southern Farm*

> *Bureau Casualty Co. v. Logan*, 238 Miss. 580, 119 So. 2d 268 (1960). Knight went to another attorney after U.S.F. & G. withdrew from his defense. Neither Knight nor the attorney appeared on Knight's behalf when the default judgment was entered. This unfortunate turn of events cannot, however, be attributed to U.S.F. & G.'s withdrawal.

(R. 1270, 1276) (emphasis added). Thus, even if Buice had standing, it cannot claim that Knight was prejudiced as a result of U.S.F. & G.'s actions.

Despite the fact that a previous judgment may have found an insured liable, courts have consistently held that an insurer still has the right to challenge questions that may make it liable on its contract. In denying an application of collateral estoppel to an insurer, the Fifth Circuit held the following:

> Although the insurers owed [the insured] a duty to defend, they do not, even by having breached that duty, *necessarily owe it a duty to pay.* This Court very recently affirmed that a "finding of [the insured's] liability, to which [the insurer who breached its duty to defend] is now bound, is distinct from the question of coverage, which cannot be created *ex nihilo* by estoppel.

Enserch Corp. v. Shand Morahan & Co., 952 F. 2d 1485, 1493 (5th Cir. 1992) (quoting *Hartford Casualty Co. v. Cruse*, 938 F. 2d 601, 605 (5th Cir. 1991)).

Furthermore, an insurer is only estopped from disputing its own liability for the insured's judgment when the issue of

coverage was addressed in the previous suit. *Enserch*, 952 F. 2d at 1491. In this case, the issue of coverage was neither addressed nor adjudicated in the default judgment. Therefore, collateral estoppel cannot be applied. *See Columbia Mut. Ins. Co. v. Fiesta Mart, Inc.*, 987 F. 2d 1124 (5th Cir. 1993)(insured's liability and whether there is concomitant coverage are separate and distinct matters and prior judgment establishing liability is not binding in subsequent proceeding on coverage).

IV.

LOWER COURT CORRECTLY DETERMINED THERE WAS NO COVERAGE UNDER THE BUSINESS AUTO POLICY.

Since collateral estoppel did not foreclose U.S.F. & G. from litigating coverage, the District Court allowed the garnishment trial to adjudicate it. In the absence of a showing of coverage, Buice may not garnish upon the U.S.F. & G. policy. The business auto policy contained a plain and clear restrictive, non-owned vehicle endorsement, JXN154-B, which provided coverage only if the vehicle was being used "solely for the business purposes" of the insured, Knight. In this case of contract interpretation, the trial court was correct in its finding of no coverage under the facts at bar.

U.S.F. & G. submits that the District Court made a proper and just determination of no coverage in view of the evidence presented at the two day trial. The District Court's thoughtful and reasoned analysis of facts surrounding the accident in view of the contract provisions certainly comported with Mississippi insurance law. It is clear from the evidence and testimony presented at trial that Gary Brock was not using his personal vehicle "solely for the business purposes" of Knight at the time of the accident. As the District Court aptly noted:

In a non-jury case, the Court must make findings of fact and credibility determinations. *Crosby Mississippi Resources v. Florida Gas Transmission Co.*, 815 F. Supp. 977, 980 (S.D. Miss. 1993). The testimony, exclusive of self-serving testimony, establishes that Brock was *not using the truck solely for the business purposes* of SKSF [Steve Knight, Jr. Steel Fabricators] at the time the accident occurred. Brock was not paid for the time spent traveling to Slidell for the purpose of obtaining his evening meal. *Smith v. Anderson-Tulley Co.*, 608 F. Supp. 1143, 1146 (S.D. Miss. 1985), *aff'd* 846 F. 2d 751 (5th Cir. 1988). *Brock was on a personal mission at the time of the accident, with no connection to his employment. Bradley v. Holmes*, 248 Miss. 44, 157 So. 2d 801, 803 (1963).

* * *

There was no evidence that Brock was paid for his time traveling to Slidell, or that Brock was acting under Knight's control or specific directions. Brock's mission for his employer was to tie up the barges when the barges arrived at the Port Bienville facility. In order to accomplish this "mission" Brock had to reach the facility. The Buice accident occurred before Brock reached Port Bienville. Therefore, *there is no evidence that Brock's trip in his private truck was "solely for business purposes." Seedkem*

> *South, Inc. v. Lee*, 391 So. 2d 990 (Miss. 1980); *see Luther McGill, Inc. v. Cook*, 306 So. 2d 304, 306 (Miss. 1975); *Price v. Colony Ins. Co.*, 520 So. 2d 964, 966-67 (La. 1987), *writ denied*, 522 So. 2d 561.

(R. 1273, 1275).

It is abundantly clear that "solely for business purposes" is a great deal more restrictive than the broad words "course and scope of employment," which were in the default, but not in the insurance policy.

Thus, after a review of all the evidence and testimony presented at trial, the District Court correctly held that there was no coverage under the business auto policy sufficient to allow Buice to garnish successfully upon said policy. In the absence of coverage, the Court properly entered a judgment releasing U.S.F. & G. from the garnishment action.

After investigating the claim, U.S.F. & G. determined there was no coverage under the business auto policy and withdrew its defense of Knight. The garnishment trial validated this decision by finding that there was no coverage under the policy for the accident. As noted by one court under a similar fact scenario,

> It is undoubtedly true that when any substantial question as to coverage exists, it may involve some risk on the part of the insurance company to refuse to defend. But in this instance, the judgment of the company in so refusing was vindicated by the finding of the trial court that the defendant, Parks, was not driving the car with the permission of the owner and was thus not covered by the policy.

McCarty v. Parks, 564 P. 2d 1122, 1124 (Utah, 1977). *See also, Sentinel Ins. v. First Ins. of Hawaii*, 875 P. 2d 894 (Hawaii 1994)(little justification of the rule of collateral estoppel in cases where there is no actual coverage and no waiver or estoppel has taken place.) Similarly, the District Court found that Brock was not using his vehicle solely for the business purposes of Knight so as to require U.S.F. & G. to provide coverage or a defense.

The courts below properly analyzed the state and federal doctrines of collateral estoppel and found that both were inapplicable to Buice's claims against U.S.F. & G. Their decisions were based upon well established principles of settled law. The analysis under federal issue preclusion rules, even if such rules differed from the Mississippi rules, which they do not, does not result in a violation of the principles set forth in *Erie v. Tompkins*, 304 U.S. 64 (1938), requiring that state law govern substantive issues in diversity cases. *Terrell*, 877 F. 2d at 1272. The instant case is simply not deserving of this Court's precious time and resources.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND L. BROWN
Counsel of Record
A. KELLY SESSOMS
BROWN, WATT & BUCHANAN, P.A.
Attorneys for Respondent
3112 Canty Street
P. O. Box 2220
Pascagoula, MS 39569-2220
(601) 762-0035